

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

74-2023

ORIGINAL

To be argued by
HOBART L. BRINSMADE

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee,
against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC.,
J. IRVING WEISS, ABRAHAM B. WEISS,
Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Appellant,
SYDNEY B. WERTHEIMER,
Receiver-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF OF CONBOY, HEWITT, O'BRIEN
& BOARDMAN, APPELLANT**

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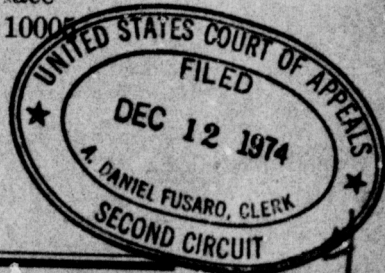


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United States Court of Appeals FOR THE SECOND CIRCUIT

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REPLY BRIEF OF CONBOY, HEWITT, O'BRIEN & BOARDMAN, APPELLANT

A. Reply to the Memorandum of the Securities and Exchange Commission, Plaintiff-Appellee

The Securities and Exchange Commission (Commission) does not question the statement in Appellant's Brief (p. 4) that the Courts for at least ninety years have held that attorneys' fees contracted for prior to an equitable receivership and rendered in opposing the appointment of the receiver are payable out of the receivership estate in the discretion of the District Court. It recognizes the fairness

of the doctrine (Commission Brief, p. 2) that "unless the attorneys for a defendant resisting receivership are assured of being able to secure payment for their services from the receiver, and on a priority basis, it will be difficult for such defendants to obtain competent counsel".

It argues, however (Commission Brief, pp. 2-3), that the Bankruptcy rule denying such fees is fairer because of two countervailing factors: (a) that the appellant law firm would receive a preference over brokerage customer creditors and (b) the Weiss brothers alone could have benefited from the legal services rendered.

With respect to item (a), there is no rule of law that brokerage customer creditors in an equitable receivership enjoy any preferential claim over other creditors. Certainly they are not preferred to administrative creditors.

With respect to item (b) the disallowance of appellant's claim will not result in any additional burden or punishment of the Weiss brothers since it is clear (58a-59a*) that no legal fee could be collected from them. It is by no means certain that the defeat of the receivership would have solely benefited the Weiss brothers (see p. 4 *infra*). But clearly the Court benefited from this being an adversary proceeding which it would not have been had defendants not had competent counsel. Courts are not equipped *sua sponte* to protect the rights of litigants not represented by counsel, especially where complicated financial transactions requiring diligent research into the law and facts are presented.

Finally, the Commission argues (Commission Brief pp. 13-14) that appellant has no claim because the temporary restraining order of March 25, 1971 prohibited the Weiss brothers from "engaging in any transactions or undertaking or creating any contractual commitment". This prohibition does not purport to (nor could it) annul and cancel existing binding contracts. It only applied to con-

* References are to pages of the Appendix.

tracts made after March 25, 1971. Appellant's retainer agreement and the basis of its claim was entered into in December 1970, long before the temporary restraining order. Neither the District Court, the Commission nor the Receiver ever objected to Appellant continuing to represent the corporate defendants after March 25, 1971, despite the restraining order.

B. Reply to the Brief of Receiver-Appellee

Although the Receiver originally took the position that Appellant based on *Barnes v. Newcomb*, 80 N.Y. 108 (1882) and *Robinson v. Mutual Reserve Life Ins. Co.*, 162 Fed. 794 (S.D.N.Y. 1908) was entitled to an allowance out of corporate funds (60a-61a), *Securities & Exchange Comm'n v. Alan F. Hughes, Inc.*, 481 F.2d 401 (2d Cir. 1973) has led him to the belief that *Barnes* and *Robinson* do not apply because the defense here interposed was against a claim of fraud and, in any event, was "captious and vexatious" (Receiver-Appellee's Brief p. 18). This change of position is all the more curious since the Receiver was fully aware that the defense interposed was against a claim of fraud and was also aware of the nature of the defense and whether it was substantial or "captious and vexatious" long before the decision in *Hughes*. Moreover, *Hughes* does not discuss *Barnes* and *Robinson* or the exception to the rule of payment when the defense is captious or vexatious.

No authority is cited by the Receiver that would indicate that an attorney defending a fraud case in good faith is not within the rule of *Barnes* and *Robinson*. It would be monstrous to penalize an attorney for defending in good faith an unproven claim of fraud no matter how heinous the charge might be. The fact that fraud was charged does not *per se* constitute an exception from *Barnes* and *Robinson*.

The Receiver-Appellee asserts (p. 20) that "it was not a *debatable* question" as to whether defendant corporations had perpetrated frauds in violation of 10(b) of the Securities Exchange Act and 17 of the Securities Act and

had sold unregistered securities in violation of 5(a) of the Securities Act.

Nothing could be further from the truth.

The voluminous record and exhibits clearly indicate that defendants vigorously contested every charge of violation of the Securities laws. Indeed, the District Court could not have found that Appellant's services were "of high order" if seven trial days and lengthy briefs, motions and arguments had been wasted in presenting the District Court with defenses to "non-debatable" questions.

The findings made by the District Court which are summarized on pages 6-8 of the Receiver-Appellee's Brief were based on conflicting proof and were never admitted by defendants.

Finally, events subsequent to 1970 have borne out the fiscal theory from which the charge of fraud arose. The then fantastic prediction that interest rates on United States Government Securities would rise from less than 4% to over 9% and the Dow-Jones stock averages would plummet from over 1000 to less than 600 has already occurred. Indeed, if there had been no receivership the defendants' customers might now have realized a substantial profit instead of the loss they incurred as a result of the forcible liquidation of their investment.

Only the District Court which tried the case, heard the witnesses and examined the documents, can determine whether Appellant presented a captious and vexatious defense. The District Court's reference to the "high order" of Appellant's services would seem to settle the matter.

Respectfully submitted

CONBOY, HEWITT, O'BRIEN & BOARDMAN
Attorneys Pro Se, Appellant

HOBART L. BRINSMADE
DAVID J. MOUNTAN, JR.
Of Counsel

(57165)

UNITED STATES COURT OF APPEALS :: FOR THE SECOND CIRCUIT

S.E.C.,
plaint iff-Appellee,

v.

Capital Counsellor, Inc. et al

Conboy, et al

appellant,

Wertheimer,

receiver-appellee

AFFIDAVIT
OF SERVICESTATE OF NEW YORK,
COUNTY OF New York, ss:

Harold dudash

being duly sworn,

deposes and says that he is over the age of 21 years and resides at 2530 Young Avenue
Bronx, N. Y.That on the 12th day of december 19 74 at new yrok, n. y.
he served the annexed Reply brief of C. J. biy, Hewitt, O'Brien & Boardman, Appellant
upon: Leon Leighton, 6 E. 45th St. NY, NY.
in this action, by delivering to and leaving with saidattorney
three true cop thereof.DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the
person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 12th
day of december 19 74 }*Harold Dudash**Roland W. Johnson*ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105
Qualified in Delaware County
Commission Expires March 30, 1975Services of three (3) copies of
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Attorney for

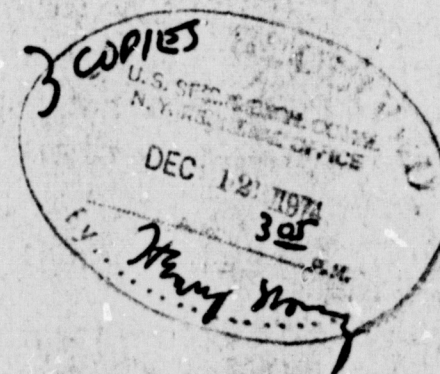
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Attorney for



74-2023

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P/S

ORIGINAL
United States Court of Appeals
For the Second Circuit.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee,
against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC.,
J. IRVING WEISS, ABRAHAM B. WEISS,
Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Appellant,
SYDNEY B. WERTHEIMER,
Receiver-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, Inc., CAPITAL ADVISORS, Inc., J. IR-
VING WEISS, ABRAHAM B. WEISS,

Defendants,

CONBOY, HEWITT, O'BRIEN & BOARDMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

1971

- June 11 Filed Opinion #37718. Cooper, J. This opinion constitutes our findings of fact and conclusions of law. * * * According the application for a preliminary injunction is granted. Settle Order Promptly On Notice. (mailed notice).
- June 11 Filed order that Sydney B. Wertheimer be and hereby is appointed Receiver of all assets and property of and owned beneficially by defts' Capital Counsellors, and Capital Advisors. Said Receiver shall filed a bond in the amount of (50,000.00) Dollars. Cooper, J. M/N.

Relevant Docket Entries

- Oct. 26 Filed Notice of Motion *re*: Application for Fees.
- Nov. 12 Filed Affidavit in opposition to application for Preference and payment of fees. Also filed Memorandum in opposition to application for Preference and payment of fees. (by Conboy Hewitt)
- Dec. 9 Filed Affidavit of service of two copies of affidavit and brief in opposition of application for payment of legal fees.
- Dec. 22 Filed Sydney B. Wertheimer, Receiver's Affidavit.
- Dec. 22 Filed Memorandum in support of the application of Conboy, Hewitt O'Brien & Boardman, Esqs. for a preference and Payment of legal fees.
- Dec. 22 Filed Memorandum in opposition to the application of Conboy, Hewitt, O'Brien & Boardman, Esqs. for a preference and Payment of legal fees.
- Dec. 22 Filed David J. Mountan, Jr. Affidavit in support of an application of Conboy, Hewitt, O'Brien, & Boardman for an order fixing fees.
- Dec. 22 Filed Memo Endorsed on motion filed 10-26-71 —Oral argument on the application for counsel fees is set for January 11, 1972 at 4 p.m. in Room 706. The movant law firm, on or before the date of the oral argument, should declare in writing the allocation of their services and time, etc., as indicated. So Ordered. Cooper, J. M/N.

*Opinion of Hon. Irving Ben Cooper, Appointing
Sydney B. Wertheimer, Receiver*

1974

- May 22 Filed Opinion #40,730-Defts. motion for payment of legal fees from the assets of receivership estate is denied in all respects.—Cooper, J. Mailed notices.
- July 22 Filed Defts. Notice of Appeal from order by Judge Cooper dated 5/22/74. (mailed notice)

**Opinion of Hon. Irving Ben Cooper, Appointing
Sydney B. Wertheimer, Receiver.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SECURITIES & EXCHANGE COMMISSION,

*Plaintiff,**against*

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC., J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants.

71 Civ. 1390

Appearances:

Hon. Kevin Thomas Duffy, Regional Administrator,
New York Regional Office, 26 Federal Plaza, New York,
New York 10007, Attorney for Securities and Exchange
Commission.

*Opinion of Hon. Irving Ben Cooper, Appointing
Sydney B. Wertheimer, Receiver*

Donald N. Malawsky, Esq., Gerald Gordon, Esq., Roger M. Deitz, Esq., Paul V. Mifsud, Esq., Of Counsel.

Conboy, Hewitt, O'Brien & Boardman, Esqs., 20 Exchange Place, New York, New York 10005, Attorneys for Defendants.

Hobart L. Brinsmade, Esq., David J. Mountan, Jr., Esq., Myron D. Cohen, Esq., Of Counsel.

IRVING BEN COOPER, D. J.:

Plaintiff Securities and Exchange Commission instituted this action on March 25, 1971 by filing a complaint alleging numerous violations by the corporate and individual defendants of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the rules and regulations enacted thereunder (Plaintiff's Complaint, March 25, 1971, p. 1-2); requesting the issuance of an injunction restraining defendants from participating in any manner in the marketing of securities subject to Section 5 of the Securities Act, and the appointment of a receiver to administer the corporate defendants' assets. (Complaint, pp. 14-23).

Contemporaneously, an order to show cause why a preliminary injunction should not issue, containing a comprehensive temporary restraining order, was entered by this Court. (Plaintiff's Order to Show Cause, Temporary Restraining Order and Affidavits, March 25, 1971). On April 2, 1971 all parties to this litigation consenting, and pending disposition of plaintiff's motion, we entered an order creating an interim arrangement with the goal of allowing defendants to continue operation of certain segments of its business without prejudice to the interests of the investing public involved in the disputed transactions. (Stipulation, Undertaking, and Order Modifying and Extending Temporary Restraining Order, April 2, 1971). That order was amended on April 8, 1971 and provided for substitution of the fiscal agent and designated an in-

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Sydney B. Wertheimer, Receiver*

dependent accountant. On May 7, 1971, an order was entered upon consent of all parties further modifying the prior court orders so as to provide a more workable interim arrangement. (Order Further Modifying and Supplementing Temporary Restraining Order, May 7, 1971).

Focusing on what we consider to be the threshold and most likely determinative issue of this litigation, the parties were directed to present evidence as to whether participation in defendants' Government Bond Plan constituted an investment contract subject to the registration provisions of the 1933 Act. Pursuant thereto hearings were held May 12, 13, 14, 17, 18, 19, 21, 1971 and on May 26, 1971 we endorsed the motion papers:

"We have decided to grant plaintiff's application for a preliminary injunction and the appointment of a receiver. The Securities and Exchange Commission is directed to promptly submit on notice complete findings of fact and conclusions of law."

Plaintiff complied June 3, 1971, defendants on June 8, 1971.

Jurisdiction is based on Section 22(a) of the Securities Act 15 U.S.C. 77v(a), Section 27 of the Exchange Act, 15 U.S.C. 78aa, and Section 214 of the Advisers Act, 15 U.S.C. 80(b)-14.

This opinion constitutes our findings of fact and conclusions of law in accordance with Rule 52, F.R. Civ. P.

The parties involved

Capital Counsellors, Inc. ("Counsellors"), a Delaware corporation with offices located at 110 Wall Street, New York, New York, has been registered as a broker-dealer with the Commission since May 12, 1960 (Tr. 548)¹ and a

¹"Tr." followed by a page reference relates to the hearing transcript.

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Sydney B. Wertheimer, Receiver*

member of the National Association of Securities Dealers, Inc. Counsellors oversees Capital Advisors Inc. and manages the Atlantic Fund for Investment in U. S. Government Securities, the Government Bond Plan and the Put and Call Program.

Capital Advisors, Inc. ("Advisors"), the alter ego of Counsellors, shares common office space, personnel and telephone service. It has been registered as an investment adviser with the Commission since January 7, 1962. (Tr. 548). Advisors publishes and sells to subscribers a semi-monthly bulletin entitled "Money and Credit Reports," also two books "The Money Squeeze" and "Final Stages of the Money Squeeze."

J. Irving Weiss ("Weiss"), the protagonist in this litigation is a founder, president and director of Counsellors and its subsidiaries, and owns a portion of the equity securities of Counselors.²

²At the outset of their investigation, the Commission apparently believed, on the basis of the broker-dealer form filed by Counsellors, that stock of the corporate defendants was owned exclusively by the Weiss brothers. Weiss testified at the hearing that after spending over 40 years on the "street" (his first exposure to Wall Street in the summer of 1924 as a typist) (Tr. 545), he thought it was "normal" that a broker-dealer could have a "limited number of investors in a small company" without disclosing to the Commission this distribution of stock (Tr. 704-5). He maintained this position although admitting that he had completed a broker-dealer registration form for the SEC that requested information concerning stockholders, and that he was aware that any change in either operation or status would require amendment of the form. "Q. Did you put those 14 stockholders [in fact there were 'about 20' stockholders in Counsellors, and 'about 14' were not members of the Weiss family (Tr. 704)] in an amended registration form? A. I don't recall our doing that" (Tr. 705). Additionally, despite his familiarity with securities practice, he was allegedly unaware that a private placement necessarily involved sophisticated and wealthy investors (Tr. 565).

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Sydney B. Wertheimer, Receiver*

Abraham B. Weiss, Weiss' brother, was a vice-president and director of both Counsellors and Advisors and owned a percentage of the equity securities of Counselors.³

The Government Bond Plan

The government bond plan, conceived by the Weiss brothers in February of 1967, combined the trading in government securities, treasury bills and long term government bonds with the anticipated fluctuation in interests to create a scheme for securing substantial profits.

Individuals were solicited to invest \$10,000 for a unit "participation" in the plan. Defendants deposited these funds in short term commercial paper until a large enough number of investors enlisted, at which point a two year loan was negotiated by Weiss' efforts for the group.⁴ The loan proceeds and cash subscriptions were then combined in what Weiss denominated a "syndicate." Each participant assumed a fraction of the loan in the amount

³Although plaintiff initially contemplated calling Abraham Weiss as an adverse witness (Tr. 425), he did not testify at the hearing. The extent of his participation in the operation of the corporate defendants was never clearly established. However, Weiss acknowledged that his brother had "a major part in the start-up of the government bond plan" (Tr. 549), and constantly employed the term "we" to describe Counsellors' management (e. g., Tr. 551, 556).

⁴Originally, defendants secured the borrowing from savings and loan associations; at the request of the SEC, banks were substituted as the source for the loan (Tr. 736).

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Sydney B. Wertheimer, Receiver*

of \$91,000,⁵ and united with a portion of his initial investment,⁶ defendants purchased for his account a 90 day \$100,000 face value treasury bill. The treasury bill was immediately pledged as collateral for the loan and deposited in an escrow account. (Tr. 575). Throughout this phase of the plan, each participant suffered a diminution of his equity as the loan's interest exceeded the profit realized from the treasury bill.⁷ As treasury bills matured, they were rolled over by defendants.

Weiss predicted in his promotional literature and lectures that in the very near future interests rates would

⁵In 1967, each participant account was debited with a \$95,000 obligation; the excess of the participant's investment not expended in the purchase of the \$100,000 face value treasury bill was "transferred in the customer's margin account as a credit" (Tr. 757). In April 1968, at the Commission's suggestion, defendants reduced the portion of the loan reflected on each participant's balance sheet to \$91,000 (Tr. 767). Under either arrangement, the participant's initial contribution was never fully invested, and the unused portion was applied to the differential between the interest due on the loan and the interest received from the treasury bill. After this balance of the participant's investment was exhausted, Weiss simply increased the amount of the loan to cover the cost of the interest differential (Tr. 768).

⁶\$1,000 was immediately deducted from each unit of investment as compensation for defendants' services.

⁷Although the investors were aware of this interest differential at this stage of the plan (Tr. 68-9, 492-3), some relied on Weiss' prediction, contained in his Memorandum on United States Government securities ("Memorandum") (P. Exs. 1, 10, 11A, 22), defendants' primary promotional literature, that "we expect your three month Treasury bills to sail right through your balmy costs so that at a given point your return from Treasury bills will carry the cost from your loan" (Tr. 187), or assurance that the "most you should be paying the first year" is \$690 (P. Ex. 19; Tr. 46, 81-2).

*Opinion of Hon. Irving Ben Cooper, Appointing
Sydney B. Wertheimer, Receiver*

soar; this would create the proper market condition for defendants to advise the participants to transfer their holdings from treasury bills to depressed long term low interest bearing government bonds. Despite the widespread unavailability of credit during this chaotic situation, the earlier margin purchase of treasury bills insured each participant access to \$100,000 to subsidize the acquisition of long term bonds. Thus the purchase of treasury bills, even at a net loss to the participant, was an integral part of the bond plan. The newly acquired long term government bonds would be substituted for the treasury bills as collateral for the loan.

Finally, Weiss had forecast a rapid retreat in interest rates which enhanced the value of the long term bonds. The participants were to realize substantial profits when the bonds would be sold after climbing in price in response to falling interest rates.

In all, defendants managed the marketing of some thirty-three (33) syndicates comprising over six hundred (600) public investors (Tr. 606) controlling some seventy (70) million dollars of treasury bills. (Tr. 596). In promoting the bond plan, defendants concededly employed the means and instrumentalities of interstate commerce and of the mails. (Tr. 589).

Investment Contract

Plaintiff contends that participation in the Government Bond Plan as outlined above and operated by defendants clearly constitutes a security as defined by Section 2(1) of the 1933 Act, 15 U.S.C. 77(b)1. Defendants resist this characterization in a two fold argument: (a) an essential element of an investment contract, the expectation of "profits solely from the efforts of the promotor" *SEC v. Howey*, 328 U. S. 293, 298-9 (1946), is absent inasmuch

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Sydney B. Wertheimer, Receiver*

as defendants merely advise the participants at the propitious moment to purchase long term bonds, the profit making phase of the plan (Tr. 953-5) and, (b) a no action letter of November 17, 1967 (P. Ex. 5) was issued by the Commission staff after reviewing with defendants the necessity for registration of the bond plan. (Tr. 956).⁸ In disposing of the position thus advanced by defendants, for purposes of this motion we treat both arguments simultaneously, for we view the presentation of the plan, as relied upon by the Commission and which formed the basis of the no action letter, as not creating an investment contract. However, defendants deviation in a number of significant respects from this approved design both amply substantiates the presence of each element of an investment contract and pierces the protective shield of the no action letter.

Deviations from no action letter

1. sophistication of investors

In their initial written correspondence with the Commission, defendants' counsel represented that the "program is designed for sophisticated and wealthy investors able to invest in multiples of \$10,000." (P. Ex. 4, September 25, 1967 letter, p. 1). Further, in that same letter,

⁸In 1967, after Capital Counsellors partnership commenced operation of the bond plan, the Commission requested Weiss to confer with their Washington staff as to "possible violation of the registration provisions under the Securities Act" (Tr. 558). As the plan operated at that time, the partnership had the discretion to transfer a participant's bills into bonds (Tr. 732). After a flurry of conversations, correspondence, and phone calls, defendants successfully sought a no action letter.

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counsel stated that "Counsellors has individually negotiated and contracted with approximately 55 investors to date," and well-to-do and sophisticated enough in money matters to realize the speculative risks, as well as the opportunities," and concluded that "the number and type of investors intended to be attracted thereby are not suitable subjects for regulation." (P. Ex. 4, p. 4). Weiss testified at the hearing that it is "still true" that the participants in the plan are all "well-to-do and sophisticated." (Tr. 570, 697).

Although we recognize that the five investors who testified at the hearing were called by the Commission,¹⁰ we note that defendants failed to present any investor to counter our impression that by and large the participants in the bond plan did not possess either characteristic. Defendants acknowledge that one, Miss Beissner, could not afford the Government Bond Plan. (Tr. 701).¹¹ Weiss

⁹In their letter of October 3, 1967, to the Commission, defendants emphasized that "In each case, the customer made a personal appointment with one of the Weiss brothers, talked the mechanics of the Program over * * *." (P. Ex. 39, p. 2).

¹⁰In fact, plaintiff conceded that some investors "are certified public accountants and may be attorneys" (Tr. 426). Plaintiff's proposal to offer a schedule of the investors was commendable (Tr. 426); however, no such document was introduced into evidence by either side.

¹¹When questioned as to how witness Beissner was accepted as a participant, Weiss offered an unsatisfactory explanation that "she never asked me whether this was in line with her resources" (Tr. 701). Further, Weiss admitted that their promotional literature did not suggest a minimum level of resources as a prerequisite for safe participation in the plan (Tr. 702). In later testimony, Weiss sought to change his testimony and stated that "At the time [of investment] I assumed" she was a sophisticated investor. When pressed as to the basis of this assumption, Weiss failed to offer credible evidence to support his conclusion (Tr. 712-14).

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characterized another investor witness as "sophisticated according to the information he gave me" (Tr. 702). He was referring to Mr. Rudin, a sixty-eight-year old part-time window cleaner with a level of formal education equivalent to "something like public school" (Tr. 445-6), who had amassed \$60,000 in life savings at the time he entered the bond plan.¹² (Tr. 492). While we found Mr. Rudin extraordinarily alert and possessed of a keen mind, we consider his closing remarks enlightening on his business sophistication and acumen. "I am very confused. I get mixed up with figures and records and I can never remember. I don't remember when was even yesterday, not even." (Tr. 497).

These witnesses were apparently representative of the larger number of participants in the bond plan.¹³ (Tr. 697-700). As to the "customer [having] a personal appointment with one of the Weiss brothers" (P. Ex. 39, p. 2), Weiss testified that this representation was no longer true, and further, that defendants never advised

¹²Witness Rudin testified that he accurately informed Weiss of his financial position prior to his entry into the plan (Tr. 494-5).

¹³Witness Horigan, before participating in the bond plan, in a letter to one of defendants' employees, Bush, director of marketing (Tr. 609), volunteered information as to his financial status (Tr. 143-5): "I am 80 years old and my income is dividends and interest on what funds we have. To go into your plan I will have to dispose of some of our holdings and sacrifice the income (with the hope of later making a capital gain, of course). So it will be a little time until I can get things lined up to go along with you, but hope to do so eventually" (P. Ex. 23). Other investors were less candid in depicting their financial status (Tr. 344-70).

*Opinion of Hon. Irving Ben Cooper, Appointing
Sydney B. Wertheimer, Receiver*

the Commission in writing that they no longer intended to personally confer with every prospective investor.¹⁴ (Tr. 605).

2. management of government securities

We view defendants' repeated representation that investors would have "the power to control the purchase and sale of the U.S. Government securities in the escrow account and thus the sole responsibility for management decision" (P. Ex. 4, September 25, 1967 letter, p. 3) as the critical factor leading to the Commission's issuance of the no action letter. (Tr. 889-92). We conclude that the participant in the bond plan, as operated by defendants, did not exercise "sole discretion" of management decision. (P. Ex. 5).

2a. rollover of treasury bills

In the initial holding phase of the program, defendants purchased three (3) month \$100,000 face value treasury bills on behalf of each unit participant: concededly,¹⁵ as

¹⁴In fact, of the 650 investors, the Weiss' personally spoke with only 200 (Tr. 606). Weiss, in a vague response maintained as to the other 450, "Either we spoke to them or our representatives, people in our organization talked to them, or we talked to them at seminars" (Tr. 607). Witness Beissner never spoke with anyone at Counsellors (Tr. 12), and apparently neither did witness Horigan (Tr. 180-1).

¹⁵Each investor was informed that defendants were rolling over treasury bills held in his account (e. g., Tr. 47-50). Defendants' promotional literature, the Memorandum in more recent editions specifically recited that "We roll over the Treasury Bills for you which you own" (P. Ex. 11A, p. 8). Of significance, the Memorandum submitted by defendants for review by the Commission did not include such a reference (P. Ex. 10; Tr. 649).

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these treasury bills matured, reinvested the proceeds in similar treasury bills (rolling over) without contacting the participant or seeking his consent. (Tr. 555-7). This unilateral rolling over of treasury bills was contrary to the representations of defendants before the Commission, and accordingly inconsistent with the program as approved by the SEC in the no action letter.

The unequivocal language consistently appearing in defendants' correspondence,¹⁶ clearly anticipates the individual participant's continuous administration over all phases of the plan—investor control of both treasury bills and long term government bonds.

In the letter of September 25, 1967, immediately after describing the assignment of a portion of the collateralized loan to the newly inducted syndicalist, defendants' counsel stated:

*This effectively transfers to each investor the right to designate how and when U. S. Government securities placed in the bank escrow account are to be bought and sold.*¹⁷ [italics in original]

Advisors then suggests from time to time to each investor how he ought to purchase and sell the Government securities in his escrow account. (P. Ex. 4, September 25, 1967 letter, p. 2-3).

Defendants' counsel in the third letter of the trilogy stated:

"Each customer, as before, would have the obligation to pay the bank loan rate on that portion

¹⁶These letters must be read in the context of what we find to be an endeavor by defendants to convince the Commission that a participation in the program did not constitute a security (Tr. 871).

¹⁷In our reading of this language and from the entire letter, we cannot find any indication or suggestion that this transfer of control over the pledged securities is not accomplished simultaneously with the participant's assumption of the loan.

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taken by him only, and would have the sole discretion (subject to the bank's right to call for more collateral) to buy and sell the securities pledged on that portion taken by him." (P. Ex. 40, p. 2).

The no action letter, confirms what we conclude was the understanding reached between the parties: that upon allocation of the secured loan,

"Each customer would have the obligation to pay the bank loan rate on that portion allocated to him and would have the sole discretion subject to the banks right to call for more collateral, to buy and sell the securities pledged on that portion taken by him." (P. Ex. 5),

and that this discretion necessarily included investment decision over pledged treasury bills as well as long term bonds.¹⁸

We find unconvincing defendants' arguments that this apparently unambiguous language was in fact understood by the Commission as permitting defendants to exercise unilateral control over the purchase of treasury bills for customers' accounts. (Tr. 956). Although defendants admit that the specific term "roll over" never appeared in any literature or correspondence sent to the Commission (Tr. 576, 659), they contend that one piece of literature [an edition of the memorandum] accompanying two of the letters clearly reveals defendants' intention to roll over treasury bills. The Memorandum, exhibit D, to defend-

¹⁸Throughout the correspondence, defendants never limited the purported area of customer discretion specifically to long term bonds, but chose the term "Government securities" which by definition includes treasury bills and long term bonds (Tr. 866, 872-4).

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ants' letter of October 3, 1967, in describing the plan's operation recites:

"Only short term U. S. Treasury Bills will be purchased at this time, in preparation for Capital gains investment in long term Government Bonds

In anticipation of a rise in interest rates, we will continue to own only U. S. Treasury Bills

You will be notified when it is time to switch to long term bonds selling at lower prices." (P. Ex. 34, ex. D, p. 6)

Likewise, an identical Memorandum was attached to defendants' letter of October 31, 1967. (P. Ex. 40, ex. C, p. 6).

We cannot accept Weiss' testimony that this language "meant" that Counsellors would be rolling over treasury bills. (Tr. 743). The Memorandum's wording, when viewed in context of the letters to which they were attached as exhibits, cannot be reasonably interpreted as in any way varying the apparent representation contained in the letters that customers would control the transfer of all the pledged securities.¹⁹ In fact, witness Chalmers, the attorney most closely associated with defendants in obtaining the no action letter, testified that this language "didn't imply anything one way or another, in my estimation" with respect to the rolling over of treasury bills. (Tr. 835-7).

¹⁹Weiss also considered the statement appearing in the Memorandum that "when the decision is made to switch from short term United States treasury bills to the purchase of long term Government securities * * * you will be so advised.", as implying that no such advice would be offered as to treasury bills and accordingly disclosure had been made of the roll over feature (Tr. 656-8). Our opinion expressed above, is equally applicable here.

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Defendants contend that in the course of describing the operation of the bond plan during the September 20 and 29, 1967 Washington meetings,²⁰ the SEC was specifically informed that one feature of the program was the unilateral roll over of treasury bills by Counsellors, (Tr. 576, 735-8); and that the SEC failed to register any objection to this aspect, but rather "in all conversations on the government bond plan. . . the assumption was taken that we were to roll over the treasury bills." (Tr. 626, 739).²¹ We find this portion of the testimony particularly hollow.

In essence, defendants ask us to read the wording of the correspondence as relating exclusively to what they consider the central issue then in dispute, ("the crux of our whole operation" [Tr. 751]) the placing of participants into long-term government bonds—that defendants' representations extended only toward insuring the participant sole discretion in the decision to switch from short term treasury bills to long term government bonds.

We find defendants testimony unconvincing; we cannot construe the term "government securities," as used in the exchange of letters, to refer only to long-term bonds. (Tr. 633-4, 749). Weiss personally aided in the preparation of letters subsequent to these alleged statements, and never suggested substituting "bonds" for the word "securities," or correcting the impression that treasury bills were included within that term. (Tr. 563, 581-3). Further, de-

²⁰Most particularly in a telephone conversation from the hall of the Commission building on September 29, 1967 (Tr. 627-8).

²¹Exhibit 38 reveals and both sides concede, that the subject of what would be done with treasury bills as they matured was discussed; however, it is unenlightening on the critical issue as to who would manage the reinvestment (Tr. 635). Likewise, the Commission's silence in May of 1970, in the course of an investigation into Counsellors' activities, is not evidence of their affirming defendants' right to roll over bills (Tr. 770-3).

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defendants' contention that the purchase of "treasury bills represented no risk [to the subscribers] and [needed] no particular know how in doing these things. But just to keep cash." (Tr. 739, 645) is inapplicable to the bond plan arrangement where bills were purchased on margin and the resulting interest differential (which could continue for 2 years) substantially eroded the participant's investment.²² (Tr. 684-5). Even assuming a non-leverage situation, the rolling over of treasury bills is not a simple ministerial act, but involves a choice as to maturity date (Tr. 577), which in turn, affects the return from the bill (Tr. 791-4)—in all, a selection from a variety of "60 or so" treasury bills. (Tr. 578).

Witness Chalmers was unable to "recall in detail" the description of the bond plan presented to the Commission's Washington staff, but recollected that the "essential features of the plan" were discussed. (Tr. 820). However, he did testify that "as far as[he] could recall" there was no objection voiced by the Commission to Counsellors rolling over the treasury bills (Tr. 827); that the only objection raised as to customer discretion related to the placing of the participant's investment into bonds. (Tr. 826-7). Although Chalmers acknowledged knowing that treasury bills were to be "rolled over without consultation with the participants" (Tr. 850), he was unable to offer a satisfactory explanation for the repeated choice of the term "U. S. Government securities" in describing the scope of customer discretion. (Tr. 880-88, 893-4).

²²Throughout the operation of the bond plan participants' funds were only invested in treasury bills. Due to the cost of supporting the loans, of the original total investment of \$6 1/2 million dollars, some 2 1/2 million dollars was lost (Tr. 717). We cannot agree with Weiss that the only risk, in the plan arose when participants funds were transferred into long term government bonds (Tr. 749A).

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Further, Chalmers testified that on one occasion, the September 25th letter (P. Ex. 4, p. 2), the term "U. S. Government securities" included "all such Government securities," both bills and bonds. (Tr. 877).

Neither the testimony of Chalmers nor Weiss convinces us that we should disregard the plain meaning of the correspondence and interpret as the understanding of the parties that customer discretion first came into effect at the bond phase of the plan. To regard the term "U. S. Government securities," unambiguously appearing in correspondence between attorneys with extensive securities law expertise, as excluding treasury bills would require our creating a tortured definition²³ unsupported by the credible evidence before us.

2b. purchase of long term government bonds

Even assuming defendants successfully established that the rolling over of treasury bills was within the purview of the no action letter, and that such activity was simply a ministerial chore and not investment management, defendants overstepped the boundaries delineated for their participation in the projected second phase of the bond plan.

It is uncontested that the bond program, as described in conversations and correspondence (Tr. 627-8, 643) and presumably as operated by defendants (Tr. 647), envisaged the participant having "sole discretion to buy and sell the securities pledged on that portion taken by him." (P. Ex. 39, p. 2). Defendants' role was restricted

²³Weiss definitions at trial: "Customers of Capital Counsellors" was defined as "anyone who buys anything from our organization" (Tr. 590). This definition would embrace 190,000 purchasers of "The Money Squeeze" and "The Final Stages of the Money Squeeze" (Tr. 592A). "Potential" meant the "possible profit," and did not include possible loss (Tr. 713-5).

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to "In particular, Advisors would alert the investor to the favorable condition for purchases in a depressed long-term U. S. Government securities market when that favorable condition comes into existence." (P. Ex. 40, p. 2).

As part of the unconvincing September 29th phone call, Weiss allegedly requested further clarification as to whether defendants could acquire a power of attorney to purchase long term bonds on behalf of the participants.

"And [*sic*] I to understand from the conversations we have had today that we can get a power of attorney from the customer to buy long term bonds?²⁴ And Mr. Sporkin said emphatically not." (Tr. 627-8).

Undeterred, Weiss, admittedly, in June 1970, requested and received permission from participants to transfer assets from treasury bills to long term bonds as to 40% of the unit investment.²⁵ (D. Ex. B, F, Tr. 639). The blanket authorization did not provide for a fixed date by which the transfer was to be accomplished, or in any way inhibit defendants' unfettered choice as to what bond to select. (Tr. 639). The fact that this authorization was never implemented is of slight significance. (Tr. 640).

Despite the Commission's clear warning to the contrary, and Weiss' conceded representation that as to this aspect of the bond plan the participant would exercise sole discretion, Weiss admitted that "We obtained their discretion. . . . We had it." (Tr. 640). Miss Beissner's sole discretion was transformed to defendants by their "share-[ing] some of that discretion with her." (Tr. 654).

²⁴We view this statement as manifesting the manner in which Weiss anticipated operating the bond plan.

²⁵Defendants accepted a formal power of attorney from investor Levine (P. Ex. 37; Tr. 504), a well-traveled "free soul" who spent much of his time "out of town."

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3. broker dealer—investment contract

In the letter of October 3, 1967, defendants' counsel sought to characterize the Government Bond Plan as equivalent to an ordinary broker's account and to distinguish the program from what traditionally would be considered as constituting a security.

"I think we were in accord with the services rendered by Capital Counsellors in securing credit for the purchase of U. S. Government securities by customers and the services rendered by Capital Advisors, Inc. in suggesting to customers how to manage their accounts did not add up to the type of activity generally regarded as separating management from ownership and creating a 'security.' A 'security' is created when a customer turns over his money to Atlantic Fund for Investment in U. S. Government Securities, Inc. In that case, Advisors puts in the buy and sell orders and has overriding discretion as to how and when the underlying securities are to be sold. The Government Securities Program however, works like an ordinary broker's account. The customer puts in the buy and sell orders, accepting or disregarding the broker's advice. The only distinction between an ordinary broker's account and the Government Securities Program is that in the latter case, the securities involved are pledged with a bank for the account of a savings and loan institution, instead of pledged with a broker for the account of the bank putting up the money. In both cases, the broker goes out and arranges the credit for a group of his customers. In both cases, it is the customers who control the disposition of the pledged securities and

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who bear the ultimate responsibility for interest and principal payments." (P. Ex. 39, p. 4).

On the basis of the evidence before us, the bond plan participation was strikingly dissimilar to the traditional broker-customer relationship; in fact it created an investment contract.

Weiss admitted in the course of his testimony that the analogy was somewhat inaccurate (Tr. 678); the plan in "many respects" operated like an ordinary broker's account "except for rolling over the treasury bills." (Tr. 610). Despite what Weiss considered a significant variation, defendants were content to employ the broad term "securities" in describing the scope of customer discretion and omit this distinction in the contrast drawn in the October 3rd letter. In rolling over treasury bills, unlike the usual brokers account, the investor was never consulted (Tr. 617), nor did defendants promptly send a confirmation of sale. (Tr. 618).

Additionally, Weiss conceded that in an ordinary margin account, the investor "is locked in" only "Until he wants to get out." (Tr. 620). As the bond plan operated, each investor was in fact "locked in" to participate in the program for two years. (Tr. 620-4).

Counsellors' financial arrangement with the customer as to the amount of the loan to be assumed by each unit participant and secured by the pledge of the treasury bills, whether approved by the Commission or otherwise, was significantly dissimilar from the standard broker account. Defendants borrowed "on customers' securities more than is owing to them" (Tr. 676), and "borrow[ed] on customers' securities without informing them that their securities were going to be borrowed against." (Tr. 678).

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Defendants, in their letter of September 25th, sought to delineate the "limited" benefits of the bond plan to the subscribing customer.

"The investor is given two things and two things alone . . . (1) the opportunity to obtain money for the purchase of U. S. Government securities at a more favorable rate than that generally available and (2) investment advisory services in deciding how and when to buy and sell these securities." (P. Ex. 4, p. 2).

In fact, defendants offered the public an opportunity to invest money in a common enterprise with the expectation that they would earn large profits solely through defendants efforts. "Form was to be disregarded for substance and emphasis was placed upon economic reality." *SEC v. Howey, supra*, at 298. The subscriber had no active role in the management of his participation. Shortly after receipt of his investment, he was, often unknowingly (Tr. 43, 163, 458-62), locked into a sizable two year loan commitment and took no part in the purchase and roll over of treasury bills credited to his account and pledged as security for his loan. Few, if any, participants had any prior experience either with government securities other than E bonds (Tr. 42-3, 303, 464) or a sophisticated leverage investment. (Tr. 60, 178, 277, 489-90). Participants never saw the underlying loan agreement (Tr. 125) or treasury bill (Tr. 176-176A). Investor Rudin never even realized that he had assumed a loan; he thought that defendants borrowed money on his behalf and he was obligated to pay the interest as part of the cost of participation. (Tr. 456-7). Mr. Murdzak echoed this sentiment, and when confronted with the contract he signed (D. Ex. O) expressly reciting that he was "taking a portion of a loan," responded, "I felt it was just a paper that I had to sign in order to get into the bond

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plan." (Tr. 309). Many, if not all, participants relied exclusively on Weiss' expertise²⁶ of trading in treasury bills and long term bonds (Tr. 112-3, 129-31, 184), and realization of profits.²⁷ (Tr. 23, 152, 453-4). Miss Beissner testified:

"A. I was paying them to take care of my money.

Q. How much were you paying them, Miss Beissner? A. I gave them a fee of \$1,000.

Q. What was your understanding of what that fee was supposed to be for? A. The fee was supposed to cover buying the Treasury bills until the bonds were low enough to buy, and then later disposing of the bonds and—well closing out the whole project.

Q. Were you supposed to do anything, Miss Beissner, in connection with this plan? A. No. The \$1,000 fee was supposed to have been the entire fee that it would cost me for their part in taking care of my plan. (Tr. 50-49, 130-1). (Transcript misnumbered).

Mr. Rudin testified:

"I followed a hundred percent their advice." (Tr. 464).

²⁶Although Weiss testified that he "never considered myself to be an expert in anything," in response to the question, "Did your literature ever claim any expertise for you in Government securities?" he answered, "I assume it did." Weiss authored this promotional literature (Tr. 552).

²⁷Separation of investment from control appears undeniable when in 1970, unknown to participants, some syndicates were closed because Weiss was unable to obtain loans (Tr. 720), of course, this precluded the purchase of treasury bills on margin (Tr. 720).

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No evidence was adduced at trial that a single participant refused to consent to Weiss' "invasion" of his discretion or failed to authorize defendants' indiscriminate purchase of long term bonds for his account. Neither was there any evidence that in the three (3) years that the plan functioned, a single participant independently contacted defendants and gave instructions to transfer his funds to long-term bonds. If defendants are correct in summarizing the failure of the bond plan with "the market was missed" (Tr. 962) by Weiss, each and every investor in the Government Bond Plan shared the misfortune attendant that misjudgment in timing.

"The Witness: I asked Mr. Weiss if he thought that by us giving him our savings he could do a better job with them than we could.

Q. Did Mr. Weiss reply to you? A. Mr. Weiss said that he has been in this business for a long time and he felt that he was more competent at doing the right thing with our money than we would be." (Tr. 270).

§10(b) and §17(a) Fraud

Defendants' widespread promotional literature and correspondence were replete with false and misleading statements omitting or concealing the substantial risks a participant undertook in subscribing to the bond plan.

Induced by claims of 3 to 1 profits (Tr. 685), prospective investors were never alerted to the fact that defendants' projections as to fluctuation in interest rates and trading prices of government securities were speculative and subject to human error (Tr. 690), that in fact such an error had occurred (Tr. 723-5), and a miscal-

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ulation could endanger their entire investment. (Tr. 684-5, 713-5). Although most participants were concerned with preserving assets (Tr. 181), defendants failed to adequately explain the dangers inherent in purchasing on margin. (Tr. 152).

Defendants' promotional "literature" by reciting that the investor "retains final control of the buy and sell decisions because you own the securities" misled investors into believing that they retained the option of withdrawing from the program. (Tr. 163, 462). Weiss confessed at trial that "some investors [were] told that they could cancel at will when they made their investment . . . some of these same investors [were] informed later that they could not cancel at will." (Tr. 708-9). Defendants occasionally permitted the withdrawal of a participant if a replacement was available to assume the departing investor's position. (Tr. 708). Defendants did not regard it necessary to inform the substitute that he was replacing a withdrawing subscriber; on at least one occasion, an individual was assigned to an existing syndicate as a replacement without being informed that, due to an intervening change in interest rates, his interest differential would be less if he were treated as a new subscriber to be placed in the most recent syndicate. (Tr. 709-11).

Over the past years, defendants' solicitation and correspondence foretold that the switch from bills to bonds was imminent. However, defendants failed to disclose to investors that they had been predicated this occurrence over a substantial period of time. (P. Ex. 44).

Defendants did disclose that while awaiting the purchase of long term bonds the interest differential would result in a net loss during the initial stage in the plan. However, in their Memorandum, defendants estimated a

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present net annual cost at \$1,075. Although Weiss told investors that he did not expect the differential to rise above 2%, undisclosed to subscribers was the fact that bill yields were steadily declining to less than 4% as interest rates of over 9% were required on loans in force. (Tr. 684). Under this circumstance, the annual cost of a participation would reach nearly 50% of the individual's investment.

Subscribers were led to believe that their \$10,000 investment would complete their obligation for a unit participation in the bond plan. (Tr. 44). Defendants never advised investors that under the terms of some loan agreements, the margin requirement would be increased as bonds were substituted as collateral. (Tr. 604). If the investor were unable to supply these additional funds, he endangered the costly liquidity position he maintained during the first phase of the bond plan.

During the tight money market in January and February 1970, three syndicates were closed because defendants were unsuccessful in replacing expiring loans. Despite the critical feature of the leverage provided by these loans to the overall success of the bond plan, the affected investors were not immediately notified, and subsequent investors were never informed of, this episode or its potential recurrence. (Tr. 720-22).

Finally, investors were informed that \$9,000 of their investment would be expended for the purchase of a \$100,000 treasury bill and that the \$91,000 balance would be the portion of the syndicate loan each would assume. (Ex. 1, p. 8). Participants were never informed that in fact treasury bills were purchased at a discount (Tr. 669), and if the full \$9,000 was allotted to the purchase only \$89,000 would need to be borrowed. (Tr. 672). Further, Weiss testified that unknown to investors this \$2,000 sur-

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plus²⁸ was deposited in banks and any interest earned was credited to Counsellor's account.²⁹ (Tr. 663-76).

Disposition

At this juncture of the litigation, this Court need not reach a final determination on the merits of the controversy, but merely resolve whether plaintiff has satisfied

²⁸Even assuming that this aspect of defendants' operation was approved by the Commission, recognizing that some portion of the investment would necessarily be maintained as free funds to pay the interest differential, investors were never accurately informed as to this procedure (Tr. 668).

²⁹The evasive nature of Weiss' responses to questioning on this aspect was quite characteristic of his entire testimony.

"Q. *** [W]hat happened to the \$2,000 additional that was borrowed. A. It was kept in the bank. Q. Was it earning any interest? A. At given times, no. Q. At other times, was it? A. At some times, it was" (Tr. 673).

When Weiss was questioned as to defendants' role in filling out questionnaires sent to participants by the SEC, the following colloquy occurred:

"Q. When did you first see it? A. One of our clients came in with it or sent it to us and asked us to help him fill it out. Q. Did you fill out some of those things in blank yourself. A. There were one or two where we helped to fill out. Q. When you say you helped, did you stand over their shoulders while the investors filled them out? A. I think there were one or two that we assisted that way. Q. Were there others that were assisted in a different manner? A. There may have been."

"*****"

"Q. Did you suggest to the investors that they send it in to you? A. No sir, I did not. Q. Did someone at Capital Counsellors suggest that? A. I believe so. If they needed help."

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its burden of establishing "a proper showing" of need for injunctive relief. *SEC v. Boren*, 283 F. 2d 312 (2d Cir. 1960); *SEC v. Broadwall Securites, Inc.*, 240 F. Supp. 962, 967 (S.D.N.Y. 1965). It has done exactly that. On the basis of the papers before us and the total hearing record, we conclude that under either statutory or common law standard, the Commission has squarely fulfilled its undertaking. Accordingly, its application for a preliminary injunction is granted.

From on or about January 1968, the defendants singly and in concert participated in the offer and sale of unregistered securities, as defined by Section 2(1) of the Securities Act, consisting of investment contracts in the defendants' Government Bond Plan. *SEC v. Howey*, *supra*; *SEC v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 352-3 (1943).

In the offer and sale of the Government Bond Plan: (a) persons invested money in a common enterprise and were led to expect profits solely from the efforts of the defendants, (b) persons invested in it because of economic inducements, (c) defendants provided management services, (d) the economic welfare of investors was inextricably woven with the ability of defendants to carry out this common enterprise for the benefit of those whose investments were solicited.

In the course of this sale of securities defendants: (a) failed to truthfully inform investors of the true costs and substantial risks of the Government Bond Plan, *S. E. C. v. Van Horn*, 371 F. 2d 181 (7th Cir. 1966); *Hughes v. S. E. C.*, 174 F. 2d 969 (D. C. Cir. 1949), (b) failed to deal fairly and honestly with their customers in the operation of the Government Bond Plan.

To prevent "diversion or waste of assets to the detriment of those for whose benefit, in some measure, this

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injunctive action is brought" *SEC v. H. S. Simmons & Co.*, 190 F. Supp. 432 (S.D.N.Y. 1961), we consider it imperative to grant plaintiff's application for appointment of a receiver.³⁰ *Bellevee Gardens, Inc., v. Hill*, 297 F. 2d 185 (D. C. Cir. 1961); *Bailey v. Proctor*, 160 F. 2d 78 (1st Cir.) cert. denied, 331 U. S. 844 (1947). Sydney B. Wertheimer, Esq., 1501 Broadway, New York, New York is hereby appointed receiver.

Settle order promptly on notice.

New York, N. Y.

June 11, 1971

IRVING BEN COOPER
United States District Judge

³⁰We are constrained to note that defendants failed to observe the restrictions contained in the outstanding temporary restraining order and interim arrangement pending determination of this application (Tr. 694-7).

31a

Notice of Motion of Conboy, Hewitt, O'Brien & Boardman, Dated October 25, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, Inc., CAPITAL ADVISORS, Inc., J.
IRVING WEISS, and ABRAHAM B. WEISS,

Defendants.

Civil Action File No. 71 Civ. 1390

SIRS:

Please Take Notice that the undersigned will bring the annexed motion on for hearing before Hon. Irving Ben Cooper, United States District Judge at Room 2904 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 9th day of November, 1971 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated, New York, New York

October 25, 1971

Yours etc.

CONBOY, HEWITT, O'BRIEN & BOARDMAN
By David J. Mountan, Jr.
Member of the Firm
Attorneys for Defendant
20 Exchange Place
New York, N. Y. 10005
DIgby 4-3131

32a

*Notice of Motion of Conboy, Hewitt, O'Brien & Boardman,
Dated October 25, 1971*

To:

Kevin Thomas Du..., Esq.
Regional Administrator
Attorney for Securities
and Exchange Commission
26 Federal Plaza
New York, N. Y. 10007

Sydney B. Wertheimer, Esq.
Receiver for Capital Advisors, Inc.
and Capital Counsellors, Inc.
1501 Broadway
New York, N. Y. 10036

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Application for Payment of Fees for Legal Services.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Conboy, Hewitt, O'Brien & Boardman, attorneys for the Defendants in this action, hereby moves this Court:

1. That its claim against Capital Counsellors, Inc. in the amount of \$10,000 for legal services rendered to such Corporation be granted preferred status against the assets of Capital Counsellors, Inc., and that the Receiver Sydney B. Wertheimer, Esq. be empowered and directed to pay to Conboy, Hewitt, O'Brien and Boardman, Esqs., for such legal services the sum of \$10,000 on or before November 30, 1971; and

2. That its claim against Capital Advisors, Inc. in the amount of \$10,000 for legal services rendered to such Corporation be granted preferred status against the assets of Capital Advisors, Inc. and that the Receiver Sydney B. Wertheimer, Esq. be empowered and directed to pay to Conboy, Hewitt, O'Brien & Boardman, Esqs. for such legal services the sum of \$10,000 on or before November 30, 1971.

Dated: New York, N. Y.
October 25, 1971.

CONBOY, HEWITT, O'BRIEN & BOARDMAN
By David J. Mountan, Jr.
Member of the Firm
Attorneys for Defendant
20 Exchange Place
New York, N. Y. 10005
DIgby 4-3131

**Affidavit of David J. Mountan, Jr., in Support of
Application.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

DAVID J. MOUNTAN, JR., being duly sworn, deposes and says:

That he is an attorney and member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs., attorneys for the Defendants in the above-entitled action.

That as appears from the affidavit of Hobart L. Brinsmade, which is annexed hereto and made a part hereof, Capital Counsellors, Inc. and Capital Advisors, Inc. have, for many years, been clients of Mr. Brinsmade, first when he was a member of the firm of Brinsmade & Schaffrann, and continued to be his clients when he became a member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs.

That as appears from Mr. Brinsmade's affidavit, Mr. J. Irving Weiss, as President and Chief Operating Officer of Capital Counsellors, Inc. and Capital Advisors, Inc., retained the firm of Conboy, Hewitt, O'Brien & Boardman generally, and that the firm was specifically employed by such companies in connection with the investigation made by the Securities and Exchange Commission (hereinafter SEC), and in connection with the subsequent litigation resulting from such investigation.

That your deponent as one of the litigating partners in the firm of Conboy, Hewitt, O'Brien & Boardman, was assigned as lead counsel in the investigation brought against Capital Counsellors, Inc. and Capital Advisors, Inc. and in the subsequent litigation which was brought

*Affidavit of David J. Mountan, Jr., in Support of
Application*

by the SEC against Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss, the latter two being President and Vice President, respectively, of the two corporate entities.

That in connection with the investigation made by the SEC into the operations of Counsellors and Advisors, the testimony of J. Irving Weiss was taken on December 29, 1970. In connection with such investigation, the testimony of William Swedlow, an employee, was taken on January 5, 1971; the testimony of Sherman Bush, Anne Purvin and Eve Weiss, employees, was taken on January 8, 1971; and the testimony of Abraham B. Weiss, Vice President of the corporate entities was taken on January 19, 1971. Your deponent appeared for and represented the corporate entities in connection with such hearings.

Subsequent to such hearings, there was frequent communication between the officers and employees of the corporate entities with this office.

Mr. Hobart L. Brinsmade, a partner of this firm, Mr. Myron D. Cohen, a partner of this firm and your deponent took an active part in this work.

In the afternoon of March 25, 1971, your deponent was advised that an application for a temporary restraining order would be made before Hon. John M. Cannella at his chambers that afternoon in connection with an action brought against Capital Counsellors Inc. and Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss for an injunction restraining the Defendants from alleged violations of various sections of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940. After hearing before Judge Cannella on the afternoon of March 25, 1971, Judge Cannella at 4:30 p. m. on that date issued a temporary restraining order. Your deponent appeared for and represented the Defendants at the hearing before Judge Cannella.

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On March 26, 1971, a further hearing was held before Judge Cannella at which your deponent represented the Defendants as a result of which Judge Cannella modified the restraining order to permit the corporate entities to meet their payrolls for the period covered by the payroll of March 26, 1971 and permitting the incurring of the costs for the mailing of "Money and Credit Reports" to the subscribers thereof on March 26, 1971.

Thereafter, on March 30, 1971, the motion of the SEC for a preliminary injunction regularly came on for hearing before Hon. Irving Ben Cooper, United States District Judge, at which time the motion for preliminary injunction was argued before Judge Cooper.

After hearing argument, a conference was held before Judge Cooper, as a result of which a stipulation was entered into after numerous and lengthy conferences between the attorneys for the SEC and your deponent, which provided a *modus operandi* pending the disposition of the motion for preliminary injunction. An order was entered on April 2, 1971 on the basis of said stipulation, appointing Arthur Andersen & Co. fiscal agent. That order was amended by an order of Judge Cooper of April 8, 1971 in which he vacated the appointment of Arthur Andersen & Co. as fiscal agent and appointed Sydney B. Wertheimer, Esq. as fiscal agent. In this same order of April 8, 1971, Judge Cooper appointed Haskins & Sells to conduct a certified audit.

Papers, consisting of affidavits and exhibits and a memorandum of law, were prepared in opposition to the Plaintiff's motion for a preliminary injunction and were served and filed. Thereafter, reply papers consisting of reply affidavits and exhibits and a reply memorandum of law were served on behalf of the Plaintiff.

In connection with the stipulation entered into between the parties, affidavits and orders were prepared permitting various payments to be made by the corporate Defendants.

Affidavit of David J. Mountan, Jr., in Support of Application

Thereafter, and as a result of numerous lengthy conferences between the fiscal agent for the corporate Defendants, the attorneys for the SEC and your deponent, a further order was signed by Judge Cooper on May 7, 1971 further modifying and supplementing the temporary restraining order of Judge Cannella.

Trial of this action commenced before Judge Cooper, without a jury, on May 12, 1971. Your deponent acted as lead counsel for the Defendants and Myron D. Cohen, Esq. assisted your deponent in the trial of this action on behalf of the Defendants. The trial continued on May 13, 14, 17, 18, 19 and 20, 1971.

Thereafter and on June 11, 1971, the Court rendered its opinion holding that the issuance of a preliminary injunction was warranted and appointing Sydney B. Wertheimer, Esq. the fiscal agent as receiver. On June 17, 1971, Judge Cooper signed the order of preliminary injunction.

In connection with the representation of the corporate Defendants in the hearings before the SEC on December 29, 1970 and in January, 1971, and in connection with representation of the corporate Defendants in the action brought by the SEC, your deponent's law firm spent over 400 hours, as more fully appears from the statement annexed hereto, made a part hereof, and marked Schedule A.

That it is respectfully submitted that the legal fees of \$10,000 for services rendered to Capital Counsellors, Inc. represents the reasonable value of the services of your deponent's law firm in this matter and were incurred in the defense in good faith and upon reasonable ground of Capital Counsellors, Inc. in the action brought against it by SEC and should be granted status as a preferred claim against the assets of Counsellors, now in the hands of Sydney B. Wertheimer, Esq. as receiver of such company.


Schedule A, Annexed to Affidavit of David J. Mountan, Jr.

That it is also respectfully submitted that the legal fees of \$10,000 for services rendered to Capital Advisors Inc. represents the reasonable value of the services of your deponent's law firm in this matter and were incurred in the defense in good faith and upon reasonable ground of Capital Advisors Inc. in the action brought against it by SEC and should be granted status as a preferred claim against the assets of Advisors, now in the hands of Sydney B. Wertheimer, Esq. as receiver of such company.

That annexed hereto as an appendix is a list of some of the authorities on which we rely for the granting by the Court of the relief herein sought.

(Sworn to by David J. Mountan, Jr., October 25, 1971.)

Schedule A, Annexed to Affidavit of David J. Mountan, Jr.

(See opposite page.) 

SCHEDULE A

TIME DEVOTED TO THIS MATTER BY
CONBOY, HEWITT, O'BRIEN & BOARDMAN
THROUGH JUNE 17, 1971

<u>Date</u>		<u>Hours</u>
December 29, 1970	Attendance at SEC hearing at which testimony of J. Irving Weiss was taken. (DJM)	7
January 4, 1971	Conference with Messrs. J. Irving Weiss, Abraham B. Weiss and William Swedlow, and telephone calls. (HLB and DJM)	3
January 5, 1971	Preparation for and attendance at SEC hearing at which testimony of William Swedlow was taken. (HLB and DJM)	5-1/2
January 6, 1971	Telephone calls re hearing. (DJM)	1-1/2
January 7, 1971	Conferences with clients re SEC hearing and telephone calls. (DJM)	2-1/2
January 8, 1971	Attendance at SEC hearings at which testimony of Sherman Bush, Anne Purvin and Eve Weiss was taken. (DJM)	4-1/2
January 11, 1971	Review of testimony at SEC hearing and telephone calls. (HLB and DJM)	1-1/2
January 12, 1971	Review of testimony of SEC, telephone calls and review of papers. (HLB and DJM)	2-3/4
January 13, 14, 15, 18, 1971	Conference with client and telephone calls. (DJM)	4-1/4
January 19, 1971	Attendance at SEC hearing at which testimony of Abraham B. Weiss was taken. (DJM)	2-1/2
January 20, 22, 28, 29, 1971	Review of papers, conferences and telephone calls. (DJM)	4-1/4
February 1, 2, 3, 1971	Conference with client re Put and Call Program and telephone calls. (HLB and DJM)	7
February 11 and 24, 1971	Conferences with client and telephone calls. (DJM)	2

Schedule A cont'd

<u>Date</u>		<u>Hours</u>
March 15, 1971	Telephone calls re hearing. (DJM)	1/2
March 25, 1971	Court appearances, conference, and review of papers. (DJM)	4
March 26, 1971	Preparation of papers, Court appearance, conferences and review of papers. (DJM)	7
March 27 and 28, 1971	Conferences with client. (DJM and MDC)	5
March 29, 1971	Conferences, preparation of papers and telephone calls. (DJM)	6
March 30, 1971	Court appearances and conferences. (DJM)	7
March 31, 1971	Conference with client. (DJM)	6
April 1, 1971	Conference with client. (DJM)	5
April 2, 1971	Court appearance and conferences. (DJM and MDC)	7
April 5, 1971	Conferences with client and preparation of affidavits in opposition to Motion for Preliminary Injunction. (HLB and MDC)	12
April 6, 1971	Preparation of affidavits and Memorandum of Law. (HLB and MDC)	13
April 7, 1971	Preparation of Affidavits. (MDC)	8-1/2
April 8, 1971	Preparation of affidavit and Memorandum of Law. (HLB and MDC)	11-1/2
April 9, 1971	Preparation of affidavit. (MDC)	6-1/2
April 12, 1971	Conferences and review of documents and telephone calls. (HLB and MDC)	5
April 13, 1971	Conferences and research. (MDC)	3/4

Schedule A cont'd

<u>Date</u>		<u>Hours</u>
April 16, 1971	Conference with client. (MDC)	5
April 19, 1971	Conference with client and with Fiscal Agent and review of papers. (DJM and MDC)	6
April 20, 1971	Conference with client and review of papers. (HLB and DJM)	3-1/2
April 21, 1971	Review of papers and conferences (DJM and MDC)	3-1/2
April 22, 1971	Telephone conference. (DJM)	1/2
April 23, 1971	Conference with client. (DJM)	1-1/2
April 26, 1971	Preparation of papers. (DJM)	5
April 27, 28 and 30, 1971	Conferences and telephone calls. (DJM)	6-1/4
May 3, 4, 1971	Conferences and telephone calls. (DJM)	6-1/4
May 5, 1971	Court appearance and conferences (DJM)	7
May 6, 1971	Conferences and telephone calls (DJM)	6-1/2
May 7, 1971	Court appearance and conference. (DJM)	7-1/2
May 10, 1971	Preparation of papers, conference and telephone calls. (DJM and MDC)	10-1/2
May 11, 1971	Conferences and preparation for trial. (DJM)	10
May 12, 1971	Trial and conferences. (DJM and MDC)	18
May 13, 1971	Trial. (DJM and MDC)	16
May 14, 1971	Trial. (DJM, EFB, MDC)	14
May 17, 1971	Trial. (DJM and MDC)	15
May 18, 1971	Trial and research. (DJM and MDC)	20-1/2

Schedule A cont'd

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<u>Date</u>		<u>Hours</u>
May 19, 1971	Trial. (DJM and MDC)	14
May 20, 1971	Conference and preparation for closing argument. (EFB and DJM)	3-1/2
May 21, 1971	Trial (DJM and MDC)	7
May 24, 1971	Conferences with client, review of papers and telephone calls. (HLB and DJM)	5-1/2
May 25, 26 and 27, 1971	Conference with client, review of papers and telephone calls. (HJB and DJM)	12-3/4
June 1, 1971	Review of papers and conferences. (DJM)	2-1/2
June 2, 3, 1971	Conferences with client, review of papers and telephone calls. (HLB, DJM and MDC)	15-1/2
June 4, 1971	Review of papers, conference and telephone calls (HLB and DJM)	5
June 7, 1971	Court appearance and conferences, review of papers. (HLB and DJM)	11-1/2
June 8, 1971	Preparation of Findings of Fact and Conclusions of Law. (HLB, DJM and MDC)	15-1/2
June 9, 1971	Conference with clients and telephone calls. (HLB and DJM)	6
June 10 and 11, 1971	Telephone calls. (DJM)	2-1/4
June 14, 1971	Review of Court opinion and telephone conferences. (EFB and DJM)	4
June 15, 16 and 17, 1971	Conference and telephone calls, and review of papers. (HLB and DJM)	9
	Total	4 19-1/4

**Appendix, Annexed to Affidavit of David J. Mountan,
Jr.**

Barnes v. Newcomb, 89 N. Y. 108;
Matter of Beha (Second Russian Ins. Co.), 136
 Misc. 715 (Sup. Ct. N. Y. 1930);
Godley v. Crandall & Godley Co., 181 App. Div.
 75, aff'd 227 N. Y. 656;
Pickrel, Schaeffer & Ebeling v. Merion, 66 N. E. 2d
 273 (Court of Appeals of Ohio 1943);
McConnell v. All-Coverage Ins. Exch., 229 C. A.
 2d 735; 40 Cal. Repr. 587;
People v. Commonwealth Alliance L. Ins. Co., 148
 N. Y. Rep. 563;
Lumbermen's Insurance Corporation v. State, 364
 S. W. 2d 429 (Court of Civil Appeals of Texas
 —1963);
Robinson v. Mutual Reserve Life Ins. Co., 175 Fed.
 624;
Robinson v. Mutual Reserve Life Ins. Co., 182 Fed.
 850, aff'd 189 Fed. 347;
 89 A.L.R. 1531 (Note).

**Affidavit of Hobart L. Brinsmade in Support of
Application.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
 County of New York, ss:

HOBART L. BRINSMADE, being duly sworn, deposes and
 says:

1. I am an attorney and a member of the firm of Con-
 boy, Hewitt, O'Brien & Boardman. Prior to March 1964
 I was a member of the firm of Brinsmade & Schafrann.

2. The first business that I ever had with J. Irving
 Weiss took place in 1960 when he consulted me as to
 the manner in which he might market a portfolio of United
 States Government Securities. I advised him that this
 could only be done by an investment company licensed
 under the Investment Act of 1940.

3. Upon his request I incorporated the Atlantic Fund
 for Investment in United States Government Securities,
 Inc. and at the same time I incorporated Capital Coun-
 selors Inc. as a distributor of such Fund and Capital
 Advisors Inc. as an investment advisor of such Fund.
 Capital Counselors Inc. was licensed as a brokerage dealer
 under the Securities Exchange Act of 1934 and Capital
 Advisors Inc. was licensed as an investment adviser under
 the Investment Advisers Act.

4. Neither I nor any firm with which I have been as-
 sociated have ever been retained or received any fees
 of any kind from Mr. Weiss personally. The services
 rendered the defendants in this action were rendered to
 and were to be paid for by Capital Counselors Inc. and
 Capital Advisors Inc.

(Sworn to by Hobart L. Brinsmade, October 25, 1971.)

Affidavit of Paul V. Misfud in Opposition to Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

PAUL V. MISFUD, being duly sworn, deposes and says:

1. I am employed by the Securities and Exchange Commission ("Commission") as an attorney in its New York Regional Office. I make this affidavit in opposition of the application for payment of \$20,000 fees for legal services of Conboy, Hewitt, O'Brien & Boardman ("petitioner"), attorneys for Capital Counsellors, Inc. ("Counsellors") and Capital Advisors, Inc. ("Advisors"), together with J. Irving Weiss and Abraham B. Weiss (collectively referred to herein as "the Weisses"), defendants in this action.

2. I am familiar with the matters alleged in the Commission's complaint and have participated in the investigation and litigation of this matter. I have examined the Commission's public and private files concerning the defendants their attorneys and members of the public who had transactions with the Weisses.

3. On March 25, 1971, the Commission filed a motion for preliminary injunction against the individual defendants in this matter as well as against the corporate defendants, for whom a receiver was sought.

4. On June 11, 1971, this Court issued an opinion that the defendants had violated the registration and anti-fraud provisions of the Securities Act of 1933 and the anti-fraud provisions of the Securities Exchange Act of

Affidavit of Paul V. Misfud in Opposition to Application

1934. On June 17, 1971, an appropriate order was signed which also appointed a receiver for the corporate defendants.

5. I have participated in the interrogation of the individual defendants, their employees and others during the Commission's investigation and resulting litigation and have examined the transcripts of their testimony.

Representation of Individuals

6. During the course of the investigation and the resultant litigation, notwithstanding benefits bestowed by petitioner upon the corporate defendants, petitioner also represented various persons including the individual defendants in this matter as set out below.

7. In connection with the Commission's investigation of this matter, on December 29, 1970, J. Irving Weiss, appearing pursuant to subpoena before me at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Misfud) Q. Under the Commission's practice, you have a right to be represented by counsel of your own choosing.

I note that you have counsel present.

Do you wish Mr. Mountan to personally represent you?

(Mr. Weiss) A. Yes.

(Mr. Misfud) Q. In addition, do you wish Mr. Mountan to represent Capital Counsellors as well?

A. Yes.

Q. Is the same true for Atlantic Fund for Investment in United States Government Securities and Capital Advisors? A. Yes.

*Affidavit of Paul V. Misfud in Opposition to
Application*

8. In connection with the Commission's investigation of this matter, on January 5, 1971, William Swedlow, appearing pursuant to subpoena before me at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Misfud) Q. Under the Commission's practice you have a right to be represented by counsel of your choosing.

I note that you have Mr. Mountan present.

Do you wish Mr. Mountan to personally represent you?

(Mr. Swedlow) A. Right.

(Mr. Misfud) Q. Does Mr. Mountan also represent Capital Counsellor and Capital Advisors?

(Mr. Swedlow) A. Right.

(Mr. Misfud) Q. You are aware of that?

(Mr. Swedlow) A. Right.

9. In connection with the Commission's investigation in the matter, on January 8, 1971, Eve Weiss, appearing pursuant to a subpoena before Roger M. Deitz, Esq. at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

I note that Mr. Mountan is here.

Is he representing you?

(Miss Weiss) A. That's right, he is.

10. In connection with the Commission's investigation in this matter, on January 8, 1971, Sherman Bush, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

*Affidavit of Paul V. Misfud in Opposition to
Application*

(Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

(Mr. Bush) A. Yes.

(Mr. Deitz) Q. I note that Mr. Mountan is here. Is he representing you personally today?

(Mr. Bush) A. Yes.

11. In connection with the Commission's investigation in this matter, on January 8, 1971, Anne Purvin, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Deitz) Q. Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

(Miss Purvin) A. Yes.

(Mr. Deitz) I will note for the record that Mr. Mountan is here.

Is he representing you here today?

(Miss Purvin) Q. Are you representing me as well?

(Mr. Mountan) A. Yes.

(Miss Purvin) A. Yes.

(Mr. Deitz) Would you answer loud enough so the reporter can hear you.

(Miss Purvin) A. Yes.

(Mr. Deitz) Thank you.

12. In connection with the Commission's investigation in this matter, on January 8, 1971, Abraham B. Weiss, appearing pursuant to subpoena before Mr. Deitz at the Commission's New York Regional Office, participated in the following colloquy:

(Mr. Deitz) Under the Commission's rules, you are permitted to be represented by an attorney of your own choosing.

*Affidavit of Paul V. Misfud in Opposition to
Application*

I note Mr. Mountan is here today.

Is he representing you today?

(Mr. Weiss) A. He is.

(Mr. Deitz) Q. Is he also counsel for Capital Counsellors, Inc.?

(Mr. Weiss) A. He is.

(Mr. Deitz) Q. And Atlantic Fund for Investment in United States Government Securities?

(Mr. Weiss) A. He is.

(Mr. Deitz) Q. And Capital Advisors, Inc.?

(Mr. Weiss) A. He is.

(Mr. Deitz) Q. And for your brother J. Irving Weiss?

(Mr. Weiss) A. He is.

13. Paragraphs 7 through 12 above show that despite petitioner's claim that he represented Counsellors and Advisors during the Commission's investigation, he clearly acted in behalf of the six individuals as well.

14. As a result of the foregoing and without an apportionment by petitioner of benefits bestowed upon the corporations and individuals, the staff cannot ascertain which portion of the total fees claimed should be allowed to petitioner as general creditors.

15. The question of Mr. Mountan's representation of individuals described in paragraphs 7 through 12 above in this matter was also raised prior to and during the course of the Commission's investigation as I discussed with him the possibility of a conflict of interest between various individuals and corporations due to his role as personal attorney for them. Mr. Mountan assured me that in his opinion no conflicts existed between these individuals.

*Affidavit of Paul V. Misfud in Opposition to
Application*

The Weisses Are Liable For the Fees

16. From April 2, 1971 until after the receiver was appointed, it was my understanding based upon representations by petitioner and various documents executed by petitioner, that petitioner would receive their legal fees for this litigation from the individual defendants as of March 25, 1971.

17. With reference to petitioner's affidavit wherein at pp. 3-4 the establishment of a "*Modus Operandi*" is related, he neglects to indicate that the central feature of the *Modus Operandi* established was that the individual defendants, not the corporate defendants, were to bear the costs of continued operations, including accounting and legal fees.

18. The April 2, 1971, Order of Judge Cooper included an indemnity account, along with certain offsetting accounts, which was to be funded by the individual defendants in order to:

"indemnify the customers of the corporate defendants from any depletion of their securities, free credit balances and other assets in the hands of the defendants their officers, directors, agents, servants, employees, *attorneys*, successors and assigns, and those in active concert and participation with them, due to any act of the defendants as of 4:30 p. m. on March 25, 1971 * * *. For purposes of this Stipulation 'customers' shall not include creditors, * * *." (Italics added.)

19. Judge Cooper's Order of April 2, 1971, also provided that the fiscal agent was empowered to:

"employ such accountants and attorneys and others as may be necessary in connection with the discharge of his duties above described * * *."

*Affidavit of Paul V. Misfud in Opposition to
Application*

20. To my knowledge Sydney Wertheimer as fiscal agent never retained the services of Conboy, Hewitt, O'Brien & Boardman for Counsellors or Advisors at any period since March 25, 1971.

21. Judge Cooper's April 2, 1971, Order also provided that:

"The corporate defendants may retain such employees as they deem necessary for office and other expenses provided that all expenses so incurred shall be paid for in full by the corporate defendants and shall in no way impair any funds owing to any public customers. All expenses herein shall be indemnified by deposits in the Indemnity Fund by the individual defendants J. Irving Weiss and Abraham B. Weiss."

22. Judge Cooper's April 2, 1971, Order was agreed to and signed by the petitioner.

23. The language quoted in paragraph 21 hereof was modified on May 7, 1971, by an Order of Judge Cooper consented to and signed by petitioner, to wit:

"The corporate defendants may retain and pay such employees as they deem necessary, and disburse such funds as they deem necessary for office and other expenses, all provided, however, that (i) no such defendants may incur any expense, or make any disbursement, unless for an activity herein permitted to be conducted by it
* * *"

24. Neither Judge Cooper's April 2, 1971, Order nor Judge Cooper's May 7, 1971, Order provide for the retention of counsel for the corporate defendants for the purpose of defending the corporate defendants against the appointment of a receiver.

*Affidavit of Paul V. Misfud in Opposition to
Application*

25. Based upon my observations and my intimate knowledge of the circumstances giving rise to the fees here requested, petitioner's efforts have from the first been exerted primarily at the direction of and for the benefit of the individual defendants.

26. Petitioner helped establish the "*Modus Operandi*" and often argued the point that the Weisses were personally bearing the cost of the litigation.

*Factors Mitigating Against Any Decision on Fees at
This Time*

27. At this juncture there are many unresolved problems which make it impossible for the Commission to review the efficacy or reasonableness of petitioner's fees vis a vis the corporate defendants.

28. The individual defendants did not honor their obligations under either the April 2, 1971 or May 7, 1971, Order with respect to the maintenance of the indemnity account.

29. The petitioner has failed to demonstrate any benefit that it has bestowed upon the corporate defendants.

30. The petitioner's affidavit fails to apportion those services rendered on behalf of the individual defendants and the corporate defendants.

31. The petitioner has not produced any documentation or argument that the corporate and individual defendants should be jointly and severally liable for the legal fees in question.

32. As of this date the Commission has no knowledge that the creditors of the corporate defendants have been formally identified by the receiver or the extent of their claims established.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

33. As of this date the Commission has no knowledge that the creditors of the corporate defendants have been notified of the instant application to afford them the opportunity to be heard.

34. Petitioner did not state, aside from citations to certain cases, why its claims for legal services incurred in the course of resisting the appointment of a receiver, should receive preferred status.

(Sworn to by Paul V. Mifsud, November 11, 1971.)

Reply Affidavit of David J. Mountan, Jr., in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

DAVID J. MOUNTAN, Jr., being duly sworn, deposes and says:

1. That he is an attorney and member of the firm of Conboy, Hewitt, O'Brien & Boardman, Esqs. and makes this affidavit in support of an application of Conboy, Hewitt, O'Brien & Boardman for an order fixing their fees for services rendered to Capital Counsellors, Inc. (herein "Counsellors") and Capital Advisors, Inc. (herein "Advisors") between December 29, 1970 and June 17, 1971.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

2. This affidavit is submitted in reply to the affidavit of Paul V. Mifsud, verified the 11th day of November, 1971, which was submitted in opposition to the application of Conboy, Hewitt, O'Brien & Boardman for the order fixing their fees for services.

3. Mr. Mifsud, at pages 2 through 5 of his affidavit questions the right of Conboy, Hewitt, O'Brien & Boardman to charge Counsellors and Advisors for the time spent at the hearings held on December 29, 1970 and on January 5 and 8, 1971 by claiming that some part of that time should be allocated and some part of the fee charged to the individuals whose testimony was then taken by the Securities and Exchange Commission in the Commission's investigation.

4. It is true that your deponent as a member of the firm of Conboy, Hewitt, O'Brien & Boardman represented the individuals when their testimony was taken by the Commission under subpoena as well as representing Counsellors and Advisors in such investigation. It must be borne in mind, however, that the individuals were represented because of their employment by Counsellors and Advisors and not for any other reason. Prior to each of the witnesses testifying, your deponent conferred with each witness and determined that the actions which they took on the matters which were the subject of investigation by the Securities and Exchange Commission were all taken within the scope of their authority as employees of Counsellors and Advisors.

5. Your deponent was convinced after conferring at length with each of the witnesses whose testimony was taken that there was no conflict of interest in your deponent's firm representing both the corporations, namely, Counsellors and Advisors, and the individuals who were served with subpoena in the investigation and so advised

Reply Affidavit of David J. Mountan, Jr., in Support of Application

the individuals. It was agreed that your deponent's firm would withdraw from the representation of any individual witness if a conflict of interest developed on the investigation. No such conflict appeared.

6. Your deponent appeared at the testimony to protect the interests both of Counsellors and Advisors and the individuals, employees of Counsellors and Advisors, as well. This representation was, your deponent believed and still believes, within the scope of the authorization given to your deponent's firm to render such services as might be necessary to protect Counsellors and Advisors in the investigation by the Securities and Exchange Commission, and it was understood that no fee for professional services would be charged to the individuals for such representation and no fee was charged.

7. Furthermore, Rule 7(b) of the Rules of the Securities and Exchange Commission relating to formal investigative proceedings provides that all witnesses shall be sequestered and unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding. Rule 6 provides that a person submitting his testimony shall be entitled to procure a copy thereof. There is no provision giving any other person a right to obtain such transcript. It is your deponent's understanding that in such investigations the officer conducting the investigations rarely, if ever, exercises his discretion to permit interested parties to be present at such investigations. Unless, therefore, deponent's firm represented the witnesses being examined it would have no right to prevent improper testimony or to have any knowledge of what such testimony might be.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

8. At pages 6 to 8, inclusive, of his affidavit, Mr. Mifsud alleges that it was his understanding "based upon representations by petitioner and various documents executed by petitioner, that petitioner would receive their legal fees for this litigation from the individual defendants as of March 25, 1971."

9. In the afternoon of March 25, 1971, your deponent was advised by telephone that an application for a temporary restraining order would be made before Hon. John M. Cannella, United States District Judge, at his chambers that afternoon in connection with this case. Your deponent appeared and represented Counsellors and Advisors and the Weisses, officers of Counsellors and Advisors. No objection was taken by the Court or by the attorneys for the Securities and Exchange Commission to such representation. Your deponent again appeared before Judge Cannella in connection with this matter on March 26, 1971. The main purpose of this hearing was to permit the corporate defendants, Counsellors and Advisors, to pay the wages of their employees, and to permit the corporate defendants to incur the cost of mailing the Money and Credit Reports to their subscribers on March 26, 1971.

10. The order to show cause signed by Judge Cannella on March 25, 1971 was returnable before Hon. Irving Ben Cooper, United States District Judge, on March 30, 1971. On the return date, your deponent on behalf of defendants sought to amend the temporary restraining order to permit, *inter alia*, the defendants to pay from their funds the normal expenses of their business, such as payrolls, rent and attorneys' fees. An affidavit of William Swedlow, controller of Counsellors, was submitted to the Court at that time, to which was attached an unaudited balance sheet showing the net capital position of Counsellors as of December 31, 1970, which balance sheet showed Counsellors to be in proper net capital position.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

11. On April 2, 1971 a stipulation was entered into between the defendants, your deponent as counsel for the defendants and Kevin Thomas Duffy, Esq., as counsel for the plaintiff providing a *modus operandi* pending the determination of plaintiff's motion for a preliminary injunction. This stipulation was so ordered by Judge Cooper at 3:30 P. M. on April 2. The main purpose of this stipulation was the appointment of a fiscal agent to cancel all loans pertaining to the Government Bond Plan and to collect the moneys remaining after applying the proceeds of the sale of Treasury Bills against the loans which they collateralized. The stipulation envisioned the continuation of the business of the corporate defendants, Counsellors and Advisors, in a limited way, and further envisioned that the corporate defendants would continue to defend the litigation by their attorneys until the final disposition by the Court of plaintiff's motion for a preliminary injunction.

12. Provision was made in Judge Cooper's order of April 2 for the setting up of an indemnity account, the funds of which were to be obtained from the personal assets of the individual defendants to take care of any payments by the corporate defendants pending the disposition of the motion for preliminary injunction over and above what was taken in by the corporate defendants through the sale of lists, handling Atlantic Fund and the accrued fees from the sale of Money and Credit Reports.

13. Nowhere in the stipulation was there any intention to prevent the corporate defendants from defending themselves in this litigation and from incurring attorneys' fees for such defense. Granted, such fees could not be paid, pending a final disposition of the motion for preliminary injunction. The further order of Judge Cooper of May 7, 1971 in no way changed this.

Reply Affidavit of David J. Mountan, Jr., in Support of Application

14. It must be borne in mind that neither of the individual defendants was either an investment advisor or a broker-dealer. Counsellors was a licensed broker-dealer and Advisors was a licensed investment advisor. The defendants and their counsel well knew that if an injunction was granted against the corporate defendants, they would automatically have to sever their relationship with Atlantic Fund and that in all probability administrative proceedings would be brought to revoke their licenses. It was important, therefore, that their interests be vigorously defended in this action for injunctive relief and such defense was, in complete good faith, undertaken.

15. A lengthy trial ensued before Judge Cooper on May 12, 13, 14, 17, 18, 19 and 20, 1971 at which the corporate defendants were represented by your deponent's firm. At no time did anyone ever question that the corporate defendants had the right to such representation or that the corporate defendants were not liable to pay for the services of your deponent's firm.

16. As a matter of fact, at the hearing before Judge Cooper on June 7, 1971, your deponent, at pages 6 and 7 of the transcript pointed out to the Court that our fees for the litigation totaled approximately \$20,000 and that we intended to submit bills (thereafter submitted) to Counsellors and Advisors for the legal services performed for them. At that hearing, attended by the attorneys for the Securities and Exchange Commission, as well as by Mr. Wertheimer, Fiscal Agent, no voice was raised that this firm was not entitled to the status of a creditor against Counsellors and Advisors.

17. It must also be borne in mind, as appears at page 13 of the transcript of the hearing before Judge Cooper on May 7, 1971, that the main issue to be litigated at the trial was the issue of whether or not the defendants in

Reply Affidavit of David J. Mountan, Jr., in Support of Application

the operation of the Bond Plan were selling unregistered securities in violation of law. The evidence presented by the defendants at the trial, for the main, was restricted to such issue. The defendants' evidence on this issue was substantial. Certainly, it goes without saying that it was important for the corporate defendants to vigorously contest this issue to preserve the corporate assets against possible further lawsuits.

18. At the various conferences held before the trial, the defendants were represented by your deponent as counsel. At the trial before Judge Cooper, your deponent acted as lead counsel and was assisted by his partner, Myron D. Cohen. As far as your deponent has been able to ascertain, the only members or associates of this firm who had dealings with Mr. Mifsud from March 25, 1971 until the present time were Mr. Cohen and myself. At no time did your deponent ever represent to Mr. Mifsud that Conboy, Hewitt, O'Brien & Boardman would not look to Counsellors and Advisors for their legal fees for representing such corporations in the investigation by the Securities and Exchange Commission and in the subsequent litigation brought by the Commission. I have discussed this matter with Mr. Cohen and he assures me that he made no such representation.

(Sworn to by David J. Mountan, Jr., November 24, 1971.)

Reply Affidavit of Hobart L. Brinsmade in Support of Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

HOBART L. BRINSMADE, being duly sworn, deposes and says:

1. That he is an attorney and counsellor-at-law and member of the firm of Conboy, Hewitt, O'Brien & Boardman. Prior to 1964 he was a member of the firm of Brinsmade & Schafrann.

2. This Affidavit is made in support of an application of Conboy, Hewitt, O'Brien & Boardman for an order fixing their fees for services rendered to Capital Counsellors, Inc. (herein "Counsellors") and Capital Advisors, Inc. (herein "Advisors") between December 29, 1970 and June 27, 1971.

3. The first time deponent was consulted by either Mr. J. Irving Weiss or his brother, Mr. Abraham B. Weiss, as to legal services was in the latter part of 1959 or early 1960. At that time Mr. J. Irving Weiss inquired as to the possibility of organizing an investment trust for public sale under the Investment Company Act of 1940 which would be limited to investment in United States Government securities. Your deponent advised Mr. Weiss that no registered investment company could make a public offering of its securities unless it had a net worth of at least \$100,000 and that in order to organize such a trust such funds would have to be obtained. Mr. Weiss advised your deponent that he did not have assets sufficient to supply such funds but would have to obtain them privately from

Reply Affidavit of Hobart L. Brinsmade in Support of Application

others. He also made it clear that deponent's fees would have to be paid out of the enterprise and would not be borne by him or his brother personally.

4. Thereafter, deponent caused to be organized Atlantic Fund for Investment in United States Government Securities, Inc. (herein "Atlantic Fund"), registered its shares for public sale with the Securities and Exchange Commission and in connection therewith organized Counsellors to act as the underwriter of such offering and Advisors to act as the investment advisor of Atlantic Fund. Your deponent was advised at the time by Mr. Weiss and his brother, Abraham B. Weiss, that they were transferring substantially all of their personal assets to Counsellors in consideration of its stock.

5. The fee for such service was billed to and paid by Counsellors and Advisors. Due to the lack of funds the major portion of such fee was not paid until 1968.

6. After 1960 Brinsmade & Schafrann, and later Conboy, Hewitt, O'Brien & Boardman, had an arrangement with Counsellors for a monthly retainer to cover advice with respect to these companies which were billed to and paid by them. The monthly retainer for October, November and December, 1970 and January, 1971 was paid out of the escrow account set up under the order of April 2, 1971 with the consent of the Fiscal Agent on June 8, 1971 as a proper charge against Counsellors and Advisors.

7. In April, 1970 Paul V. Mifsud, an attorney for the Securities and Exchange Commission, called your deponent and stated that in order to make an intelligent investigation of the books and records of Counsellors and Advisors, he required the presence of the companies' auditor to explain what the entries in the books signified. At Mr. Mifsud's requests your deponent went to the Securities and Exchange Commission with Mr. William Swedlow, a cer-

Reply Affidavit of Hobart L. Brinsmade in Support of Application

tified public accountant and an employee of Counsellors. The services rendered on this occasion were billed and paid for by Counsellors and Advisors. No fee was charged for representing William Swedlow individually.

8. On or about December 16, 1970 the Commission issued an order of investigation into whether Counsellors and Advisors and certain of their employees had violated various sections of law involving securities and shortly thereafter issued and served subpoenas upon Counsellors, Advisors and various of their employees as individuals. At that time your deponent spoke with Mr. J. Irving Weiss and advised him that such investigation could lead to an injunction proceeding against Counsellors and Advisors, the appointment of a receiver and might ultimately lead to the revocation of the licenses held by Counsellors as a broker-dealer under the Securities Exchange Act of 1934 and the license held by Advisors as an investment advisor under the Investment Advisor Act. Mr. Weiss, as president of Counsellors and Advisors, requested your deponent to render such services as might be necessary to protect defendants Counsellors and Advisors from such sanctions, it being understood that deponent's firm would be paid the reasonable value of the services so to be rendered. This agreement made in December, 1970 was never thereafter modified or cancelled and is still in full force and effect.

9. On or about November 9, 1971 your deponent was consulted by Mr. J. Irving Weiss and Mr. Abraham B. Weiss as to whether or not deponent's firm would represent them individually in the administrative proceedings which the Securities and Exchange Commission had begun against them to bar them from employment by any broker-dealer or investment advisor. Your deponent was advised that neither of them had any funds nor any prospect of funds which could be used for such purpose. They also

Affidavit of Sydney B. Wertheimer in Opposition to Application

advised your deponent that the funds which were used to maintain the escrow account pursuant to the order of April 2, 1971 had been borrowed by them and they were unable to repay the amounts so borrowed.

(Sworn to by Hobart L. Brinsmade, November 24, 1971.)

Affidavit of Sydney B. Wertheimer in Opposition to Application.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,
County of New York, ss:

SYDNEY B. WERTHEIMER, being duly sworn, deposes and says:

1. I was appointed Receiver of all assets and property of and owned beneficially or otherwise by defendants Capital Counsellors, Inc. and Capital Advisors, Inc. I duly qualified in that capacity.

2. This affidavit is made to set forth my position with respect to the application of Conboy, Hewitt, O'Brien & Boardman for payment of legal fees by the corporate defendants.

3. I respectfully disagree with the position of the Securities and Exchange Commission ("Commission"), that attorneys who represent the corporate defendants in proceedings brought against them by the Commission are

Affidavit of Sydney B. Wertheimer in Opposition to Application

not entitled to be paid out of corporate funds. It would be an injustice not to permit such corporations adequately to defend themselves, albeit the charges are ultimately sustained and a receiver is appointed for their assets. It would be difficult for corporations thus charged to obtain competent counsel unless the latter are assured of being paid regardless of the outcome. The fact that the corporations are ultimately found guilty of the charges may properly enter into valuation of the attorneys' services, and therefore warrant a lesser amount than would be payable if the corporations be successful, but, in my opinion, should not preclude all payment.

4. I do agree with the position of the Commission that the attorneys are not entitled to be paid by the corporations for services rendered to the individual defendants, J. Irving Weiss and Abraham B. Weiss, or to the individuals who appeared as witnesses before the Commission pursuant to subpoena: Eve Weiss, Swedlow, Purvis and Bush. The attorneys should be required to specify exactly what services were rendered to the two corporate defendants, and the exact time devoted thereto.

5. The affidavit of Mr. Mountan shows that, of the total of 400 hours spent, 60 were spent prior to the appointment of the Fiscal Agent on March 27, 1971. I have been advised by counsel that, to the extent that such services were rendered to the corporations and distinguished from the individuals, they merely constitute a claim against the corporations, and cannot be treated as an administration expense. This portion of the application should therefore be deferred until proofs of claim are filed. Further, it is urged that this portion of the claim is not entitled to a preferred status.

(Sworn to by Sydney B. Wertheimer, December 14, 1971.)

Memorandum-Order of Hon. Irving Ben Cooper, Dated December 21, 1971, Ordering Movant Law Firm to Declare Allocation of Services.

SEC v. Capital Counsellors, Inc., et al.—71 Civ. 1390

Oral argument on the application for counsel fees is set for January 11, 1972 at 4 p. m. in Room 706.

While the following information sought by the Court may ultimately be given significant weight or accorded little consideration or even discarded, the movant law firm, on or before the date of the oral argument, should declare in writing the allocation of their services and time (a) between the periods prior to March 27 and the period subsequent thereto; (b) as to the period subsequent to March 27, the services rendered to Capital Counsellors, Capital Advisors, individual defendants and individual witnesses.

We are prompted to request this data in view of the contentions made by the Securities and Exchange Commission and the Receiver.

So Ordered:

New York, N. Y.
December 21, 1971

IRVING BEN COOPER
U. S. D. J.

Letter, Addressed to Hon. Irving Ben Cooper by David J. Mountan, Jr., Dated January 4, 1972.

January 4, 1972

Hon. Irving Ben Cooper
United States District Judge
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Securities and Exchange Commission v.
Capital Counsellors, Inc., *et al.*

Dear Judge Cooper:

This letter is written to you in accordance with the direction contained in your order of December 21, 1971 that this firm should declare in writing the allocation of their services and time (a) between the period prior to March 27, 1971 and the period subsequent thereto; and (b) as to the period subsequent to March 27, 1971, the services rendered to Capital Counsellors, Inc., Capital Advisors, Inc., individual defendants and individual witnesses.

As to the allocation of our services and time between the period prior to March 27, and the period subsequent thereto, Your Honor is respectfully referred to Schedule A attached to the original notice of motion, dated October 25, 1971. Specifically, the number of hours spent by your deponent's firm prior to March 27, 1971 comes to 59¾ hours.

As to the period subsequent to March 27, 1971, no service was rendered to any individual witness. Subsequent to March 27, 1971, all of the time spent by this firm was in connection with the action brought by the Securities and Exchange Commission against the two corporate defendants and the two individual defendants, officers of the corporate defendants. As appears from page 3 of the affidavit of Hobart L. Brinsmade, verified November 24, 1971,

Letter, Addressed to Hon. Irving Ben Cooper by David J. Mountan, Jr., Dated January 4, 1972

this firm was requested by Mr. J. Irving Weiss, as President of Counsellors and Advisors to render such services as might be necessary to protect Counsellors and Advisors in any action brought against them by the SEC for injunction, the appointment of a Receiver or for sanctions and no services were rendered additional to what was so required.

Respectfully submitted,

DAVID J. MOUNTAN, JR.

DJM, JR.:F

CC: Kevin Thomas Duffy, Esq.
Regional Administrator
Attorney for Securities and
Exchange Commission
26 Federal Plaza
New York, N. Y. 10007

Leon Leighton, Esq.
Attorney for Sydney B. Wertheimer
Receiver
6 E. 45th Street
New York, N. Y. 10007

**Opinion and Order 40,730 of Judge Cooper Denying
Application for Counsel Fees, Dated May 22, 1974.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Appearances:

Hon. William D. Moran, Regional Administrator, Securities and Exchange Commission, 26 Federal Plaza, New York, New York 10007, Attorney for Plaintiff, Roger M. Deitz, Esq., Of Counsel.

Leon Leighton, Esq., 6 East 45th Street, New York, New York 10017, Attorney for Receiver.

Conboy, Hewitt, O'Brien & Boardman, Esqs., 20 Exchange Place, New York, New York 10005, Attorneys for Defendants, David J. Mountan, Jr., Esq., Of Counsel.

IRVING BEN COOPER, D. J.:

We have before us a motion by defendants' attorneys, Conboy, Hewitt, O'Brien and Boardman, Esqs., for payment of \$20,000 in legal fees out of the assets of Capital Counsellors, Inc. and Capital Advisors, Inc. (hereafter "Counsellors" and "Advisors") which comprise the receivership estate. The motion is opposed by the Receiver as well as the Securities and Exchange Commission (hereafter "SEC") on the ground that the desired relief would impose an unfair burden upon public investors who have already suffered substantial losses as a result of defendants' proven misconduct. After careful consideration of movant's claim and of the nature and purpose of the underlying action, we conclude that such fees are not payable out of the assets of the receivership estate. Accordingly, the motion is denied in all respects.

The fees at issue are for services rendered from March 25, 1971 when the Court first acquired jurisdiction over

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

the administration of the assets of Counsellors and Advisors until and including June 17, 1971, the date of the preliminary injunction. The fees arose out of defendants' efforts to resist the application of the SEC for injunctive relief and appointment of a receiver. Movant represented both corporate defendants, Counsellors and Advisors, as well as the individual defendants, J. Irving and Abraham B. Weiss, who were president and vice-president respectively of the corporate entities. The temporary restraining order was signed on March 25, 1971 which froze the assets of Counsellors and Advisors. Thereafter, by our order of April 2, 1971 the customers of Counsellors and Advisors were indemnified from any further depletion of their assets in defendants' possession. On June 11, 1971, after trial of the action, the Court held that injunctive relief was warranted and appointed a receiver to administer the remaining assets of Counsellors and Advisors. Specifically the Court found that defendants had committed the following fraudulent acts:

(a) Sale of unregistered securities in violation of the Securities Act §5(a) and (c), 15 U.S.C. §77e(a) and (c);

(b) Selling securities by means of untrue statements in violation of the Securities Act §17(a), 15 U.S.C. §77q(a); and

(c) Employing manipulative or deceptive devices in the sale of securities in violation of the Securities Exchange Act §10(b), 15 U.S.C. §78j(b) and Rule 17 CFR 240.10b5. See *SEC v. Capital Counsellors, Inc.*, 332 F. Supp. 291 (S.D.N.Y. 1971). The preliminary injunction was signed June 17, 1971.

We find the issue here raised is resolved by the application of the reasoning in a recent decision, *SEC v.*

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

Alan F. Hughes, Inc., 481 F. 2d 401 (2d Cir.), cert. denied, 42 U.S.L.W. 3352 (Dec. 10, 1973). There the Securities Investor Protection Corporation (hereafter "SIPC") had applied for appointment of a trustee for the liquidation of a registered broker-dealer charged with various violations of the federal securities laws. That application was unsuccessfully opposed by defendant broker-dealer and its president. Defendants' counsel thereafter sought to recover fees for resisting the application from assets of the liquidated estate or alternatively from funds provided by SIPC. The Court denied recovery holding that resisting liquidation was not a "purpose of the liquidation proceedings" within the meaning of the Securities Investor Protection Act of 1970 (hereafter "1970 Act"). 15 U.S.C. §78fff(a) and (f)(2). Further, though it could so provide, Congress had not in fact authorized payment of such fees by an estate liquidated pursuant to the 1970 Act. The Court concluded that its decision did not deny defendants due process or equal protection inasmuch as the Constitution does not require the appointment of counsel in civil cases and, as is equally true herein, defendants suffered no deprivation of legal services. Finally, the Court found a compelling analogy to the Bankruptcy Act under which it has long been held that legal services in resisting a bankruptcy petition are not compensable thereunder.

"Moreover, if the Constitution does not require exemption from a filing fee for an indigent who seeks to take advantage of the bankruptcy laws, see *United States v. Kras*, 409 U. S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973); it surely does not require that a brokerage firm resisting an application be entitled to have its attorneys paid out of the estate."

SEC v. Hughes, 481 F. 2d at 403.

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

Though the *Hughes* case involved an interpretation of the 1970 Act, its reasoning is equally applicable to the instant proceeding. If legal services rendered in opposition to a bankruptcy proceeding are not compensable out of the bankrupt estate, then clearly the services rendered herein in opposition to the SEC application for injunctive relief and receivership are also not compensable from the assets of Counsellors and Advisors.

Bankruptcy may result from ineptitude or misfortune without any imputation of fraud. Here the receivership was imposed not only because defendants were failing to meet their customer obligations but also because that failure resulted from fraudulent acts perpetrated by defendants in violation of the Securities Act and the Securities Exchange Act. See *SEC v. Capital Counsellors, Inc.*, *supra*.

The purpose of these Acts was to achieve a high standard of business ethics in the securities industry and prevent fraud in the purchase and sale of securities so as to protect the public investor and minimize his losses. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963); *Zeller v. Bogue Elec. Mfg. Corp.*, 476 F. 2d 795 (2d Cir. 1973). The intent of the 1970 Act was similarly to protect customers of broker-dealers who had fallen into financial difficulty and incapable of meeting their customer obligations; imputation of fraud to the broker-dealer is unnecessary. See *SEC v. Alan F. Hughes, Inc.*, 461 F. 2d 974 (2d Cir. 1972); *Lohf v. Casey*, 350 F. Supp. 356 (D. Colo. 1971). Clearly, public policy as enunciated in the *Hughes* case, 481 F. 2d 401, is unalterable in its position that defendants, found to have committed the fraudulent acts aforementioned, shall not be permitted to impose the burden of defending themselves upon customers and other creditors who have al-

Opinion and Order 40,730 of Judge Cooper Denying Application for Counsel Fees, Dated May 22, 1974

ready suffered losses in excess of 4 million dollars. That defendant's attorneys failed to provide for adequate assurance of compensation other than through reliance upon a successful defense of the action is no reason for transferring their loss to the public.

The Acts which defendants were found to have violated provide for payment of attorneys fees in certain instances. See Securities Act of 1933 §11(e), 15 U.S.C. §77K(e); Securities Exchange Act of 1934 §§10(b) and 14(a), 15 U.S.C. §§78j(b) and 78n(a). Thus shareholders who have established a violation of the securities laws by their corporation and its officials should be reimbursed by the corporation or its survivor for costs of establishing the violation. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Kahan v. Rosenstiel*, 424 F. 2d 161 (3rd Cir. 1970); *Wolf v. Frank*, 477 F. 2d 467 (5th Cir. 1973); *Feder v. Harrington*, 58 F.R.D. 171 (S.D.N.Y. 1972). Similarly where defendants have obtained dismissal of a complaint brought under the federal securities laws, they may be entitled to reimbursement if it is shown that the claim was devoid of merit. See *Klein v. Shields & Co.*, 470 F. 2d 1344 (2d Cir. 1972); *Katz v. Amos Treat & Co.*, 411 F. 2d 1046 (2d Cir. 1969).

The underlying rationale of these cases, as we interpret them, is that where prosecution or defense of an action under the federal securities laws has been in furtherance of the purpose of those laws—protection of the public investor—then the parties bearing the costs of such prosecution or defense are entitled to reimbursement. See *Mills v. Electric Auto-Lite*, *supra*, at 241; *Smolowe v. Delendo Corp.*, 136 F. 2d 231 (2d Cir. 1943). Applying that reasoning to the instant proceeding, we find that defendants' opposition to the SEC application in no way furthered the interests of their public investors.

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Notice of Appeal

Although the professional services rendered were of high order and deserving of the legal fees requested, the cost of the opposition interposed here cannot be paid out of the receivership estate.

So Ordered:

New York, N. Y.

May 22, 1974

IRVING BEN COOPER
United States District Judge

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

SIRS:

Notice Is Hereby Given that Conboy, Hewitt, O'Brien & Boardman hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Hon. Irving Ben Cooper, U.S.D.J., entered in this action on May 22, 1974, denying the motion of Conboy, Hewitt, O'Brien & Boardman for payment of \$20,000 in legal fees out of the assets of the receivership estate of Capital Counsellors, Inc. and Capital Advisors, Inc.,

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Notice of Appeal

for their services as attorneys for Capital Counsellors, Inc. and Capital Advisors, Inc., defendants in this action.

Dated: New York, N. Y.

July 22, 1974

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By: David J. Mountan, Jr.

Member of the firm

Attorneys *Pro Se*

Office & P. O. Address:

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New York, N. Y. 10005

(212-344-3131)

To:

Clerk of the United States District Court

Southern District of New York

Foley Square

New York, N. Y.

Hon. William D. Moran

Regional Administrator

Securities and Exchange Commission

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New York, N. Y. 10007

Attorney for Plaintiff

Leon Leighton, Esq.

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New York, N. Y. 10017

Attorney for Receiver

Windels & Marx, Esqs.

Attorneys for Acquire Company

51 West 51st Street

New York, New York 10019

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Notice of Appeal

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hereby admitted this *4th* day
of *October*, 197*4*

Ann Appender
Attorney for *Heuer*

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hereby admitted this *day*
of *197*

Attorney for

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74-2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2023

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC.,
J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,

Appellant,

SYDNEY B. WERTHEIMER,

Receiver-Appellee.

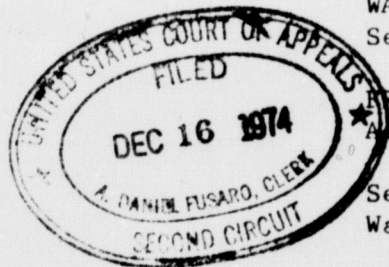
On Appeal From The United States District Court
For The Southern District Of New York

SUPPLEMENTAL APPENDIX OF THE
SECURITIES AND EXCHANGE COMMISSION, APPELLEE

WALTER P. NORTH
Senior Assistant General Counsel

FREDERICK L. WHITE
Attorney

Securities and Exchange Commission
Washington, D.C. 20549



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

CAPITAL COUNSELLORS, INC.
CAPITAL ADVISORS, INC.
J. IRVING WEISS
ABRAHAM B. WEISS

Defendants.

71 Civil Action
File No. 1390

ORDER TO SHOW CAUSE,
TEMPORARY RESTRAINING
ORDER AND AFFIDAVITS

On motion of the plaintiff, Securities and Exchange Commission, and upon the complaint herein and the affidavits of Paul V. Mifsud and John M. Bennett annexed hereto and the appendix filed herein, and all other papers and prior proceedings herein, and it appearing that the defendants Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss, pending final determination of this action will, unless restrained, continue to engage in acts and practices in violation of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), 77e(c) and 77q(a), Sections 8(c), 10(b), 15(c)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78h(c), 78j(b), 78o(c)(1), 78o(c)(3) and 78q(a) and Rules 17CFR 240.8a-1, 10b-5, 15c1-4, 15c3-1, 15c3-2, 17a-3 and 17a-4 thereunder and Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6(1), 80b-6(2) and 80b-6(4) and Rule 17CFR 275.206(4)-1 thereunder, and that immediate and irreparable injury, loss and damage will result to the customers of defendants and to members of the investing public, it is hereby

I

ORDERED that defendants Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss show cause, if any there be, to a Judge of this Court at 10:00 o'clock A.M. on [March] 30, 1971, Room 506 of the U.S. Court-house, Foley Square, New York, New York, or as soon thereafter as the matter can be heard, why a preliminary injunction as requested by the plaintiff Securities and Exchange Commission pursuant to Rule 65 of the Federal Rules of Civil Procedure should not be granted and a receiver appointed for Capital Counsellors, Inc. and Capital Advisors, Inc.;

II

ORDERED that pending determination of the plaintiff Securities and Exchange Commission's motion for a preliminary injunction and the appointment of a receiver as requested herein the defendants and their officers, directors, agents, servants, employees, attorneys, successors and assigns and those persons in active concert or participation with them, and each of them, be and they hereby are restrained from, directly and indirectly:

A. Making use of any means or instrumentalities of interstate commerce and of the mails, in the offer and sale of United States Treasury Bills, United States Government Bonds, investment contracts known as the defendants' Bond Plan or any other securities issued or to be issued by defendants, their subsidiaries or affiliates, or any other securities, to employ any device, scheme or artifice to defraud, to engage in any transaction, practice or course of business which operates or would operate

as a fraud or deceit upon any purchaser, or to obtain money or property by means of untrue statements of material facts or omissions to state material facts, necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including but not limited to:

- (1) the safety and degree of risk entailed in purchasing the securities;
- (2) profits to be derived from the purchase of the securities;
- (3) the use of proceeds derived from the sale of securities;
- (4) the business and operation of the issuer of the securities;
- (5) the refund or return of proceeds invested in the securities;
- (6) supervision of the issuer of securities by regulatory agencies;
- (7) the true equity position of investors in the securities;
- (8) the need for haste to make investment in the securities; and
- (9) the amount of money required for an investment in the securities.

B. Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of any prospectus or otherwise, investment contracts in the form of the defendants' Bond Plan, or any other securities issued or to be issued by defendants, their subsidiaries or affiliates, or any other securities, unless and until a registration statement has been filed with the Securities and Exchange Commission as to such securities, or while a registration statement filed with the Securities and Exchange Commission as to such securities is the subject of a refusal order or stop order of the Securities and Exchange Commission, or (prior to the effective date of the registration statement), any public proceeding or examination under Section 8 of the Securities Act of 1933.

C. Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell investment contracts in the form of the defendants' Bond Plan or any other securities issued or to be issued by defendants, their subsidiaries or affiliates, or any other securities, through the use or medium of any prospectus, or otherwise, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities.

D. Carrying such securities or causing them to be carried through the mails or in interstate commerce by any means or instruments of interstate transportation for the purpose of sale or delivery after sale, unless and until a

registration statement is in effect with the Securities and Exchange Commission as to such securities, Provided, however, that nothing in paragraphs II B, C and D of the foregoing portion of the requested injunction shall apply to any security which is exempt from the provisions of Section 5 of the Securities Act of 1933, 15 U.S.C. 77e.

E. Violating or aiding or abetting violations of Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6(1), 80b-6(2) and 80b-6(4) and Rule 206(4)-1 thereunder in connection with the writing, publishing and distributing of articles, recommendations, news items, telegrams and other publications to investors and potential investors, clients, potential clients of Advisors and others suggesting and recommending the purchase, retention and sale of various securities and not disclosing in connection therewith certain material facts including but not limited to:

- (1) the true amounts and nature of the fees involved in defendants' programs;
- (2) the exorbitant nature of the fees;
- (3) the extent of losses incurred by previous investors;
- (4) the true and full nature of risks involved in defendants' programs;
- (5) the profits to be derived from such programs;
- (6) the use of hyperbole; and
- (7) the use of one-sided testimonials.

F. Violating or aiding and abetting violations of Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(3) and Rule 15c3-1 thereunder by making use of the mails and means of instrumentalities of interstate commerce to effect transactions for the accounts of customers while the aggregate indebtedness of defendant Capital Counsellors, Inc. to all other persons exceeds 2,000 (two thousand) per centum of its net capital.

G. Violating or aiding and abetting violations of Section 8(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78h(c) and Rule 8c-1 thereunder by transacting business through the medium of a member of national securities exchange while directly or indirectly hypothecating or arranging for or permitting the hypothecation of securities carried for customers of defendant Capital Counsellors, Inc., under circumstances that permit customers securities carried for the account of customers to be hypothecated, or subject to any lien or liens or claim or claims of the pledgee or pledgees for a sum which exceeds the aggregate indebtedness of all customers in respect to securities carried for their accounts.

H. Violating or aiding and abetting violations of Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 thereunder by failing to make, keep accurate, complete and current and preserve the general ledger, blotters, customer ledger, stock record and other records of defendant Capital Counsellors, Inc.

I. Violating or aiding and abetting violations of Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(3) and Rule 15c3-2 thereunder by using funds arising out of free credit balances carried for the accounts of customers in connection with the operation of defendant Capital Counsellors, Inc. without establishing adequate procedures pursuant to which each customer for whom a free credit balance is carried is sent a written notice that such funds are not segregated and may be used in the operation of the business of said defendant.

J. Violating or aiding and abetting violations of Section 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(1) and Rule 15c1-4 thereunder by engaging in acts designed to effect with or for the accounts of customers of defendant Capital Counsellors, Inc. transactions in and/or to induce the purchase or sale by such customers of securities (other than U. S. Tax Savings Notes, U. S. Defense Savings Stamps or U. S. Defense Savings Bonds, Series E, F and G) without, at or before the completion of each such transaction, giving or sending customers written notification.

III

ORDERED that defendants Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss and their officers, directors, agents, servants, employees, attorneys, successors, assigns, depositories and banks, and those persons in active concert or participation with them,

and each of them, except such receiver or trustee as the Court may appoint, for defendants Capital Counsellors, Inc. and Capital Advisors, Inc. be and they hereby are restrained from, directly or indirectly, transferring; setting off, receiving, changing, selling, pledging, assigning or otherwise disposing or withdrawing any assets and property owned controlled or in the possession of defendants Capital Counsellors, Inc. and Capital Advisors, Inc. except as may be directed or approved by any receiver or trustee appointed herein.

IV

—ORDERED that defendants Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss and their officers, directors, agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them, and each of them, be and they hereby are restrained from, directly or indirectly, soliciting, initiating, accepting or engaging in any transaction or undertaking or creating any contractual commitment of or in behalf of or for the accounts of defendants Capital Counsellors, Inc. and Capital Advisors, Inc., except as may be directed or approved by any receiver or trustee appointed herein.

V

ORDERED that all creditors of defendants Capital Counsellors, Inc. and Capital Advisors, Inc., and all other persons, firms, and corporations, including sheriffs, marshals and other officers and their deputies, and the respective

attorneys, servants, agents and employees of any and all such persons, firms or corporations are stayed and restrained from commencing, prosecuting, continuing or enforcing any suit or proceeding, other than any proceeding instituted or to be instituted by plaintiff Securities and Exchange Commission, or any receiver or trustee which the Court may appoint herein, or from executing or issuing or causing the execution or issuance of any Court attachment, subpoena, replevin, execution or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property owned by or in the possession of said defendants, or the receiver or trustee which the Court may appoint herein, wheresoever situated, and from doing any act or thing whatsoever to interfere with the possession or management of said receiver or trustee of the property and assets owned, controlled or in the possession of said defendants, or in any way interfere with said receiver or trustee in the discharge of his duties herein, or to interfere in any manner during the pendency of this proceeding with the exclusive jurisdiction of this Court over said defendants.

VI

ORDERED that pending the request for the appointment of a receiver herein any pending bankruptcy, mortgage foreclosure, equity receivership, or any other proceeding to reorganize conserve or liquidate defendants Capital Counsellors, Inc. and Capital Advisors, Inc. or their property and any

proceeding to enforce a lien against the property of said defendants and any customers' securities pledged as collateral for any loan by said defendants and all other suits of any kind which are pending against said defendants shall be stayed except for this present action.

VII

ORDERED that ~~defendants shall transmit the text of~~ Section I through VI of this Order by mail to each of their customers on or before 10 o'clock a.m. Eastern Standard Time, ~~March 1971.~~ ^{JMC}

ORDERED that service of the within Order to Show Cause and Temporary Restraining Order shall be effected upon the defendants on or before 5:00 o'clock p.m., March 26, 1971.

Service of this Order, Summons and Complaint, Affidavit and Memorandum of Law herein may be made by representatives of plaintiff Securities and Exchange Commission.

VIII

ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

s/ John M. Cannella
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 25, 1971

4:30 p.m.

NOV 18 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

CAPITAL COUNSELLORS, INC.
CAPITAL ADVISORS, INC.
J. IRVING WEISS
ABRAHAM B. WEISS

Defendants.

71 Civil Action
File No. 1390

STIPULATION, UNDERTAKING
AND ORDER MODIFYING AND
EXTENDING TEMPORARY
RESTRAINING ORDER

U.S. DISTRICT COURT

FILED

APRIL 5, 1971

S.D.N.Y.

WHEREAS, the plaintiff Securities and Exchange Commission brought this action to restrain and enjoin the defendants Capital Counsellors, Inc., Capital Advisors, Inc., J. Irving Weiss and Abraham B. Weiss from violating certain provisions of the Federal securities statutes, rules and regulations thereunder and for other relief; and

WHEREAS, on March 25, 1971, United States District Judge John M. Cannella of the United States District Court for the Southern District of New York entered an Order to Show Cause and Temporary Restraining Order against the defendants herein; and

WHEREAS, plaintiff's motion for a preliminary injunction against said defendants having come to be heard before United States District Judge Irving Ben Cooper on March 30, 1971, and having been taken under advisement;

IT IS HEREBY STIPULATED, CONSented, AND AGREED by and between the plaintiff and all defendants and their respective attorneys that this Stipulation, Undertaking, and Order and the Temporary Restraining Order signed by Judge Cannella on

March 25, except as modified by Judge Cannella's Order of March 26 and as specifically modified hereinafter, are to remain in full force and effect up to and including a final disposition by this Court of plaintiff's motion for a preliminary injunction.

IT IS FURTHER STIPULATED, CONSENTED AND AGREED by and between the plaintiff, and all defendants and their respective attorneys that:

- (1) An escrow account entitled "Customer Indemnity Account" ("Indemnity Account") shall be established by the individual defendants J. Irving Weiss and Abraham D. Weiss for the benefit of all customers of the corporate defendants; *per [unclear]* funds deposited in the Indemnity Account under the circumstances hereinafter described shall be obtained exclusively from the personal assets *of [unclear]* of the individual defendants J. Irving Weiss and Abraham D. Weiss and shall be used to indemnify the customers of the corporate defendants from any depletion of their securities, free credit balances and other assets in the hands of the defendants their officers, directors, agents, servants, employees, attorneys, successors and assigns, and those in active concert and participation with them, due to any act of the defendants as of 4:30 p.m. on March 25, 1971. Disbursement or other disposition shall be made from the Indemnity Account only by further order of this Court. For purposes of this Stipulation "customer"

[2.]

shall not include creditors but shall include that term as defined by Rule 8c-1(b)(1) promulgated under Section 8(c) of the Securities Exchange Act of 1934 (except that no customer shall be excluded from this definition solely by reason of an act of unlawful hypothecation by the defendants herein.) The Indemnity Account fund as hereinafter established may be offset by any sums received by defendants for renting customer lists or for fees received in connection with the Atlantic Fund for Investment in United States Government Securities or for the accrued portions of renewals of Money & Credit Reports by subscribers who have been furnished with copies of all litigation releases to the date of the renewal.

- (2) This Court is requested to appoint a fiscal agent for the corporate defendants to serve until the Court makes a final determination of plaintiff's request for the appointment of a receiver for the corporate defendants. The fiscal agent is authorized and empowered to:
 - (a) cancel all loans pertaining to the Government Bond Plan ("Bond Plan");
 - (b) sell all Treasury Bills which pertain to the Bond Plan and apply the proceeds of these sales against the loans which they collateralize;
 - (c) collect all monies which remain after steps (a) and (b) above are completed, and deposit the same in an interest-bearing escrow

[3.]

account to be established at a bank in New York City for the benefit of public investors in the Bond Plan as their interest shall appear after audit hereinafter described;

- (d) conserve all other funds and investments of all public customers of the defendants;
 - (e) take possession of all the books and records of the corporate defendants and conduct a certified audit of those books and records and oversee and account for all receipts and disbursements of the defendant corporations;
 - (f) employ such accountants or attorneys and others as may be necessary in connection with the discharge of his duties above described; and
 - (g) lending institutions are authorized and empowered to engage in steps acts described in sub-paragraphs (a) and (b) of this paragraph, and shall retain all monies which remain after these acts are completed for the benefit of public customers of the defendant corporations until receipt of further instructions from the fiscal agent.
- (3) Defendants will bear all fees and expenses of the fiscal agent and his employees. Any payments made pursuant to this Stipulation, Undertaking

and Order shall result in a like sum being deposited in the Indemnity Account and shall in no way impair funds held by the defendants for customers.

- (4) The corporate defendants may retain and pay such employees as they deem necessary and disburse such funds as they deem necessary for office and other expenses provided that all expenses so incurred shall be paid for in full by the corporate defendants and shall in no way impair any funds owing to any public customers. All expenses herein shall be indemnified by deposits in the Indemnity Fund by the individual defendants J. Irving Weiss and Abraham B. Weiss.
- (5) The fiscal agent shall report all receipts and disbursements by the corporate defendants to this Court, and copies of said reports are to be furnished to the Securities and Exchange Commission at its New York Regional Office, by 10:00 a.m. each Wednesday, to speak as of the close of business the preceding Friday. Similarly, reports shall be submitted as to the condition of all escrow accounts.
- (6) The defendants may continue their respective lawful functions in conjunction with the Atlantic Fund for Investment in United States Government Securities provided however, that this Stipulation is in no way construed to impair that portion

of the Restraining Order with respect to conducting business while not in compliance with the Net Capital requirements of Section 15(c)(3) of the Securities Exchange Act of 1934 and Rule 15c3-1 thereunder and the penalties in connection therewith including but not limited to contempt of Court or any other penalty for violation thereof. In connection therewith all the defendants have been advised that it is still the plaintiff Commission's position notwithstanding the affidavit of William Swedlow dated March 30, 1971 that the defendant Capital Counsellors, Inc. is not in compliance with the aforesaid Rule 15c3-1.

- (7) The individual defendants shall initially fund the Indemnity Account with a deposit of \$7,000 by the next business day after the signing of this Order. Each succeeding required deposit shall be made prior to or simultaneous with the related expense item. This paragraph (7) is subject to the offsetting credits in paragraph (3) hereof.
- (8) Capital Advisors' publication - Money & Credit Reports - may continue to be published and mailed to clients who were subscribers as of the last mailing, provided that these subscribers receive copies of all Commission litigation releases pertaining to this matter (one copy of each of which will be furnished to the defendants) with the separate notation that the defendants deny the allegations and are requesting a hearing of the

facts; and provided further that all expenses incurred directly or indirectly therewith will be bonded by a sum equal to these expenses being deposited in the Indemnity Account.

- (9) All opposing papers are to be served upon the plaintiff by 4:00 p.m. Friday, April 9, 1971.
- (10) This Court shall retain jurisdiction of this matter for all purposes, including the power to appoint an attorney to represent the parties, if needed.
- (11) No tender, offer, promise, or threat of any kind has been made by plaintiff, Securities and Exchange Commission, or any member, officer, agent or representative thereof in consideration for this Stipulation, Undertaking and Order.

CAPITAL COUNSELLORS, INC. AND
CAPITAL ADVISORS, INC.

By

J. IRVING WEISS

By

ABRAHAM B. WEISS

J. IRVING WEISS, Individually

ABRAHAM B. WEISS, Individually

DAVID MOUNTAIN, ESQ.
Counsel for all Defendants.

KEVIN THOMAS DUFFY, ESQ.
Counsel for Plaintiff

SO ORDERED:

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 8, 1971
3:30 P.M.

I hereby certify that the foregoing is a true and correct copy of the original as filed with me.

SECURITIES AND EXCHANGE COMMISSION v. CAPITAL COUNSELLORS,
INC., et al. - 71 Civ. 1390

The within appointment of Arthur Anderson &
Co. as fiscal agent is vacated. Sydney B. Wertheimer, Esq.,
1501 Broadway, New York, New York, is hereby appointed
fiscal agent.

I hereby appoint Haskins & Sells, 2 Broadway,
New York, New York, as accountant to conduct a certified
audit as provided for by section 2(c) of this order.

SO ORDERED:

New York, N.Y.
April 8, 1971

STIPULATION, UNDERTAKING AND
ORDER MODIFYING AND EXTENDING
TEMPORARY RESTRAINING ORDER

71 CIVIL 1390

KEVIN THOMAS DUFFY
Regional Administrator

Attorney for the Plaintiff
SECURITIES AND EXCHANGE COMMISSION
Office and Post Office Address:
26 Federal Plaza
New York, New York 10007
Telephone No.: (212) 264-1636

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

CAPITAL COUNSELLORS, INC.
CAPITAL ADVISORS, INC.
J. IRVING WEISS
ABRAHAM B. WEISS

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, : 71 Civil Action
File No. 1390

Plaintiff, :

-against- :

CAPITAL COUNSELLORS, INC., : ORDER FURTHER MODIFY-
CAPITAL ADVISORS, INC., : ING AND SUPPLEMENTING
J. IRVING WEISS, : TEMPORARY RESTRAINING
ABRAHAM B. WEISS, : ORDER

Defendants. :

Upon the annexed affidavit of Sydney B. Wertheimer,
the fiscal agent for the corporate defendants herein, sworn
to May 7, 1971, upon the appended consents hereto of all of
the defendants and their attorney, and Paul V. Mifsud and
Roger M. Deitz, of counsel to the plaintiff, having appeared
before me and stated, for the record, that plaintiff
has no objection to the entry of the within order,
it is

ORDERED, that the Order to Show Cause and Temporary
Restraining Order of Judge John M. Cannella herein dated
March 25, 1971, as modified by his further order herein
dated March 26, 1971, as further modified and extended by
the orders of Judge Irving Ben Cooper herein dated April 2,
1971 and April 8, 1971, filed April 5, 1971 and April 8,
1971, respectively, be, and the same hereby is further modi-
fied and supplemented as follows:

I. Sydney B. Wertheimer, the fiscal agent herein, is hereby designated as the sole signatory of the following time deposit accounts, presently in the name of "Sydney B. Wertheimer, as Fiscal Agent for Capital Counsellors, Inc., et al.":

<u>Depository Bank and Branch</u>	<u>Maturity Date</u>
The Chase Manhattan Bank, N.A. One Chase Manhattan Plaza New York, New York	May 19, 1971
The Chase Manhattan Bank, N.A. One Chase Manhattan Plaza New York, New York	June 1, 1971
First National City Bank 55 Wall Street New York, New York	June 10, 1971

and of such other or further time deposit accounts as he may open in his name as fiscal agent as aforesaid at either of the above banks or any other bank in New York City; and the fiscal agent shall have the full and sole authority and discretion to instruct the said banks with respect to the said accounts now or hereafter established, and to effect any withdrawals therefrom; all provided, however, that no such withdrawal may be made unless either (a) pursuant to further order of this Court or (b) for the purpose of purchasing from or through the bank from which such withdrawal is made its certificate(s) of deposit, which certificate(s) may bear such interest rate or be purchased at such yield as the fiscal agent in his discretion shall deem appropri-

ate, shall mature no later than sixty (60) days from the date of the fiscal agent's acquisition of the same and shall be left in the custody of the bank through or from whom it was acquired, until the same shall mature, be redeemed or sold as hereinafter provided. The fiscal agent is to have full power and discretion to sell or redeem (either at or prior to maturity) any such certificate at such time and terms as he may see fit and, also at his sole discretion, he may deposit the proceeds of such sale or redemption, or of any time deposit, in any other or further time deposit account at any bank in New York City or reinvest the same in a later-maturing certificate of deposit maturing in sixty (60) days or less, also to be maintained in the custody of the bank from or through which he may acquire the same.

II. All funds received by any one or more of the defendants from (a) renting customers' lists, (b) fees in connection with the Atlantic Fund for Investment in United States Government Securities, and (c) renewals of Money & Credit Reports shall be deposited by the recipient, immediately upon receipt thereof, in the account entitled "Capital Advisors, Inc.—Escrow" maintained at The Chase Manhattan Bank, N.A. and designated as account number 910-1-362342, and hereinafter referred to as "Advisors' Escrow Account".

III. The paragraphs numbered (4) and (5), at page 5, of the order of Judge Irving Ben Cooper herein dated April 2, 1971 and filed April 5, 1971, as heretofore modified and supplemented (hereinafter called the "April 2 Order") are hereby, effective forthwith, deleted in their entirety, and the following language substituted in their respective place and stead:

"(4) (a) The corporate defendants may retain and pay such employees as they deem necessary, and disburse such funds as they deem necessary for office and other expenses, all provided, however, that (i) no such defendant may incur any expense, or make any disbursement, unless for an activity herein permitted to be conducted by it and in accordance with the conditions and limitations, if any, upon such activity herein contained, including, without limitation, the approval by the fiscal agent of the employment of personnel if and to the extent such approval is herein required; and (ii) no disbursement be made, in any event, unless with the approval of the fiscal agent endorsed thereon in accordance herewith, or upon further order of this Court.

(b) The defendant Capital Advisors, Inc., in addition to such other rights to continue its activities as it may have hereunder, shall have the right to continue to rent and maintain customers'

"lists owned by it in the normal and usual course of its business. The said defendant, in connection with such activity, may employ only the minimum number of personnel consistent with the continued operation of its business as aforesaid. The defendants, or any of them, may also employ such personnel as the fiscal agent, in his sole discretion, may deem necessary or advisable, and may approve, (i) to perform caretaking functions in respect to the records pertaining to discontinued activities, such as the Government Bond Plan and the Put and Call Plan, (ii) to assist the fiscal agent and/or Haskins & Sells in the retrieval from or collation of information contained in such records or (iii) to perform such day-to-day bookkeeping functions as may be essential.

(c) The fiscal agent shall have the following authority and discretion in respect to the employment of the personnel by either or both of the corporate defendants. Such discretion shall be sole and unqualified, subject, however, to the right of any corporate defendant to apply to the Court, upon notice to the plaintiff and to the fiscal agent, for an appropriate change or modification in respect to the fiscal agent's exercise or non-exercise of such discretion in any particular instance:

"(i) The right to discharge, with or without cause, any employee of any corporate defendant upon such notice, if any, as the fiscal agent may deem necessary or appropriate;

(ii) The right to arrange, with any present employee, for a reduction in his or her number of hours per week or per day that such employee presently devotes to the business of his employer; provided, however, that there be a reduction in compensation on a pro rata basis, to reflect such reduction in hours; and

(iii) The right to approve the employment by either of the corporate defendants of any person to replace an employee who has died, resigned, or been discharged.

(d) Without limiting the authority and discretion of the fiscal agent as in (4) (c) above provided, the aggregate gross salaries paid by Capital Advisors, Inc. in respect to its activities, if any, permitted in respect to the Atlantic Fund for Investment, may not exceed \$200.00 per week."

"(5) (a) Defendant Capital Advisors, Inc. may, at periodic intervals, but not more often than weekly, draw upon the Advisors' Escrow Account and submit to the fiscal agent, for his approval as hereinafter provided, checks for payments the making of which it considers would not breach or violate any restraint imposed by the order herein dated March 25, 1971, as

heretofore or herein modified and/or supplemented. All checks so submitted shall be accompanied by an affidavit in the form and substance set forth as Exhibit 1 of this stipulation, and forming part hereof, which affidavit shall be executed by J. Irving Weiss and William Swedlow in their capacities more particularly therein set forth, with all blanks therein, and in the schedules annexed thereto, appropriately filled in. The checks submitted shall be listed in Schedule A of each such affidavit and there shall be appended to the said Schedule A the certification of Haskins & Sells to the effect that the disbursements therein listed are for expenses actually incurred by defendant Capital Advisors, Inc. for the respective purposes therein set forth. Each such affidavit, together with its annexed schedules and appended certification of Haskins & Sells, is hereinafter referred to as a "Check Approval Request". Prior to the submission of each Check Approval Request to the fiscal agent, the defendants shall cause a copy thereof to be personally delivered to the New York office of the Securities and Exchange Commission, 26 Federal Plaza, New York City, and proof or admission of such delivery, and the date and time thereof, shall be appended to the original thereof submitted to the fiscal agent. The fiscal agent, in his discretion, may vary the form of Exhibit 1 and/or of any schedule thereof, and/or may require such other or further affidavits or proofs as he may deem appropriate. Plaintiff's failure to object to any disbursement shall

"in no wise be deemed to exonerate defendants or any of them from any liability or responsibility with respect to such disbursement or the incurring of the relevant obligation thereof.

(b) The fiscal agent may, in his sole and unqualified discretion, either approve, or withhold his approval, in respect to any one or more checks listed in a Check Approval Request and, if acting in good faith, he shall have no liability or responsibility whatever with respect thereto (including, without limitation, any liability or responsibility to any creditor, stockholder or customer of any of the defendants. In the exercise of such discretion he may (but need not) rely, wholly or in part, on the truth of the statements made and data set forth in the referable Check Approval Request. The fiscal agent shall, however, defer approving any check included in a Check Approval Request until 12:00 noon of the day following the date of delivery of the copy thereof to the Securities and Exchange Commission, as reflected by the proof or admission of such delivery appended to or endorsed upon the original.

(c) The fiscal agent shall indicate his approval of any check by affixing his signature to the

"following legend, which shall be endorsed upon the face of the check and The Chase Manhattan Bank, N.A. is authorized and directed to honor any check bearing such endorsement and signed by the fiscal agent as aforesaid:

'APPROVED

SYDNEY B. WERTHEIMER, as Fiscal
Agent for Capital Counsellors,
Inc. and Capital Advisors, Inc.'

The fiscal agent shall return to Capital Advisors, Inc. any checks which he disapproves, with a brief explanation of his reasons for such disapproval. Despite any such disapproval of any such check, Capital Advisors, Inc. may, if it so elects, apply to the Court for the Court's approval thereof.

(d) Anything herein to the contrary notwithstanding, neither the approval of any check by the fiscal agent, nor the payment thereof by the drawee bank, shall in any wise absolve the defendants or any of them from any liability or responsibility which they might otherwise have in the event that the Court should determine that the withdrawal of funds effected by such check, or any act, matter or thing done or suffered to be done by the defendants or any of them which led to, or in any manner relates to, the issuance of such check,

"shall have been in breach of any restraining order of this Court then in effect."

5/7/71
BSC

IV. Defendants J. Irving Weiss and Abraham B. Weiss, immediately upon the signing of the within order, shall deposit in the Advisors' Escrow Account (either as a capital contribution to Capital Advisors, Inc., or as a fully subordinated loan to it on such terms as may be approved by plaintiff) the sum of \$5,484.29. Defendant-Capital Advisors, Inc. shall forthwith pay to the fiscal agent, out of its aforesaid account number 910-1-362342 at The Chase Manhattan Bank, N.A., the sum of \$5,175.00 as and for the fiscal agent's fee for services rendered to and including Friday, April 30, 1971, and the further sum of \$5,334.50 to Haskins & Sells as and for its fee for services rendered, and disbursements incurred, through the same date. The said fee of the fiscal agent shall be exclusive of such disbursements as he has heretofore incurred, which disbursements shall be later computed and billed. The order herein of April 2, 1971, insofar as the same relates to the creation and purposes of the said "Indemnity Account", and offsets thereto, is hereby modified (a) so as to impress upon the said Indemnity Account a first lien and charge, prior to the rights of any public investors, customers or creditors of the defendants or any of them, in favor of the fiscal agent and Haskins & Sells, respectively, for their respective disbursements herein heretofore or hereafter incurred,

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and for their further fees herein for services rendered, and (b) so as to include, as additional offsets, the aforesaid sum of \$5,484.29 when and if paid, as hereinabove provided, and, also when and if paid, such additional sums, if any, as defendants J. Irving Weiss and Abraham B. Weiss may hereafter pay into Capital Advisors, Inc. as capital contributions or as fully subordinated loans on terms approved by the plaintiff. The fiscal agent and Haskins & Sells shall render their further billings on a weekly basis commencing with the week ending May 8, 1971, and each such bill shall be paid by defendants within five business days after the same has been rendered. If any fee or disbursement be disputed, the same shall be fixed by the Court. The obligation of the defendants to pay the disbursements, herein, and further fees herein, shall be joint and several, and such obligations may be enforced by the respective obligees with or without first resorting to the Indemnity Account.

V. Haskins & Sells are authorized to continue their audit of the condition of the corporate defendants, as of March 31, 1971, which is the date of the most recent fiscal year end of each such defendant, and to continue to perform such other services, if any, as the fiscal agent or Haskins & Sells may request from time to time by way of verification of the accuracy of any of the corporate defendants' current accounts or of any statements furnished to the corporate defendants or to the fiscal agent. The authority and discretion vested in the fiscal agent pursuant to subparagraphs (d) to (f), inclusive, of Paragraph (2) of the aforesaid April 2 Order as heretofore modified shall not be deemed to carry with it any obligation on his part to exercise the same, and he may exercise any such authority or discretion to such extent, and at such times, as he may determine.

VI. No withdrawal may be made from the Indemnity Account (The Chase Manhattan Bank, N.A. account number 910-1-362227) unless with the approval of the fiscal agent endorsed thereon or upon further order of this Court.

VII. The fiscal agent is hereby authorized to demand and receive from any creditor or former creditor of any of the corporate defendants (a) such paid notes or other negotiable instruments as such defendant may be, or may have been, entitled to receive upon payment of its indebtedness to such creditor, and (b) confirmations of sales of Treasury bills and statements of account, in such detail as the fiscal agent may reasonably request in order to facilitate audit of the corporate defendants' books of account.

VIII. The fiscal agent is further authorized to perform, or delegate the performance of, such work, if any, to incur such disbursements, such as telephone charges and cost of mailings, if any, as he may, in his discretion, deem necessary or appropriate in order to respond to inquiries by public investors in the Government Bond Plan and/or the Put and Call Plan, or others who have dealt with either of the corporate defendants, as to the status of the within proceedings, and/or to generally advise interested parties, from time to time, as to such status, by form letter or otherwise.

IX. As modified and supplemented hereby, the Order to Show Cause and Temporary Restraining Order herein dated

March 25, 1971, as heretofore modified and extended, shall remain in full force and effect.

Dated: New York, New York
May 7, 1971.

11:00 a.m.

Ray B. [Signature]
UNITED STATES DISTRICT JUDGE

The undersigned hereby consent to the foregoing order:

CAPITAL COUNSELLORS, INC. and
CAPITAL ADVISORS, INC.

By: *[Signature]*
J. Irving Weiss

By: *[Signature]*
Abraham B. Weiss

[Signature]
J. IRVING WEISS, Individually

[Signature]
ABRAHAM B. WEISS, Individually

[Signature]
DAVID MOUNTAIN, ESQ.
Counsel for all Defendants

Consent to [illegible] to [illegible] in [illegible] at 11:00 a.m. and 11:00 p.m.
[Signature]
[illegible]

United States District Court
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

against

CAPITAL COUNSELLORS, INC.,

CAPITAL ADVISORS, INC.,

J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants.

71 Civ. 1390

**RECEIVER'S REPORT
 AND
 PETITION**

TO THE HON. IRVING BEN COOPER
 UNITED STATES DISTRICT COURT:

The petition of SYDNEY B. WERTHEIMER, respectfully shows to the Court and alleges:

THE PROCEDURAL BACKGROUND

1. By Order of this Court dated April 8, 1971, which modified earlier Orders of this Court dated March 5, 1971 and April 2, 1971, Petitioner was appointed Fiscal Agent of Defendants Capital Counsellors, Inc. ("Counsellors"), and Capital Advisors, Inc. ("Advisors"); and by further Order dated June 11, 1971, Petitioner was appointed Receiver of all assets and property of said defendants and of all assets or property which they carried or maintained for the account of others.

2. By further Orders of this Court dated September 21, 1972 and December 21, 1972, among other things:

(a) the Fiscal Agent's account for the entire period of the fiscal agency, and the Receiver's Account from June 11, 1971, the date of his appointment, through December 31, 1971, was approved,

(b) Participants in Counsellors' Government Bond Plan and Put & Call Plan, and certain other persons reflected on the books of Counsellors and/or Advisors as creditors of either or both, were, as hereinafter more particularly set forth, "deemed" without the necessity of action on their part, to have filed claims against Counsellors and Advisors,

(c) the form in which such participants' claims other than "deemed" claims (hereinafter called "Claims for Excess") and any other claims must be filed was provided, and October 30, 1972 was established as the "bar date" beyond which no further claims could be filed without leave of the Court,

(d) the Receiver was required to, and did, file a report, following the bar date, setting forth the nature and amount of the claims against Counsellors and Advisors,

(e) interim allowances were made to the Receiver and his attorney, and

(f) approximately \$3,000,000 of Counsellors' total assets of about \$5,000,000, was, as hereinafter more particularly related, distributed to Government Bond Plan participants with plus account balances, as interim distributions on account, such distributions being intended to constitute the minimum respective amounts to which these participants would be entitled irrespective of how the Court eventually resolved the question of what the relative priorities should be between the various classes of claimants.

THE RELIEF SOUGHT ON THIS PETITION

3. This Petition seeks a Court hearing upon the following items:

(a) Approval of the Receiver's accounts from January 1, 1972 to March 31, 1973 inclusive.

(b) The nature of what further proofs, if any, are required to be submitted by "deemed" claimants against Counsellors and/or Advisors as a condition of allowance of their respective claims and the time and manner in which such proofs should be submitted.

(c) The disposition of the aforesaid "Claims for Excess" heretofore filed, all of which, as hereinafter set forth, the Receiver recommends be deemed timely filed but be disallowed on their merits, and the disposition of such other or further claims, if any, as may have been duly and timely submitted to the Receiver, and either approved or rejected by him.

(d) The relative priorities to be accorded to all allowed claims in the distribution of the assets remaining in Receiver's hands, including, without limiting the generality of the foregoing, the determination as to whether, to what extent and in what manner allowed claims should be

(i) Counsellors,

(ii) Advisors,

(iii) both corporations;

and whether and to what extent any assets of either corporation should be deemed impressed with a trust in favor of any claimant or class of claimants.

(e) Approval of further interim allowances to the Receiver, his counsel and Haskins & Sells, the accountants for the receivership estate.

(f) The removal of certain restraints, hereinafter more particularly described, relating to the disposition of certain funds in the hands of the Receiver, to the extent, if any, that such restraints are still in effect.

THE ASSETS REMAINING TO BE DISTRIBUTED

4. As hereinafter set forth in greater detail, the assets of Counsellors which, as of March 31, 1973, were available for distribution or had been distributed consist of cash aggregating about \$5,000,000 (of which about \$3,000,000 has heretofore been distributed on account to "GBP Account Balance Claimants", as hereinafter defined); and non-cash assets valued, as of March 31, 1973, at \$220,015, consisting chiefly of stock of Advisors, which is Counsellors' wholly owned subsidiary. Advisors has been almost fully liquidated and its present net worth is approximately \$200,000*.

NATURE OF THE "DEEMED" CLAIMS

5. Paragraph 6 of this Court's Order of September 21, 1972 provided, among other things, that participants in Counsellors' Government Bond Plan and Put and Call Plan were to be deemed, without further action on their part, to have filed claims against Counsellors as follows:**

"(a) Persons who had a Haskins & Sells zero account balance will be deemed to have filed a claim in the amount of such person's net investment,

(b) Persons who had a Haskins & Sells minus account balance will be deemed to have filed a claim in the amount of such person's plus net investment reflected in Schedule A or Schedule B of the aforesaid Receiver's August 18, 1972 affidavit less the amount of such minus account balance,

(c) Persons who had a Haskins & Sells plus account balance will be deemed to have filed a claim for the amount of such plus account balance and, if Schedule A or Schedule B, as the case may be, shall reflect that any such person has a plus net investment, a further claim for the amount, if any, by which such plus net investment exceeds the amount of such plus account balance of the Receiver's August 18, 1972 affidavit."

The purpose of this provision was to render it unnecessary for participants in these Plans to go to the trouble and expense of engaging counsel to prepare and submit formal proof of either their respective net investment in the Plans, or their Haskins & Sells account balances. These respective amounts had already been reported to the Receiver and to the Court by Haskins & Sells, which firm had, pursuant to the Court's direction, conducted an audit of Counsellors' books for the purpose of determining the respective interests of participants in the Plans.

6. Paragraph 7 of the said order of September 31, 1972, provided in effect that certain claims*** listed in Schedule C of the Receiver's August 18, 1972 affidavit as having been approved by the Receiver, in whole or in part, were to be considered "deemed claims" to the extent of such approval.

7. As provided in subparagraph 14(d) of the September 21, 1972 order, all "deemed claims" were to be deemed asserted against Counsellors and Advisors, jointly and severally.

8. Subparagraphs 14(a) through 14(c) inclusive of the September 21, 1972 order provide in effect that the Court, for good cause shown by any interested party, may require any "deemed" or other claimant to furnish evidence in support of his claim; that the validity of any deemed claim may be challenged by the Receiver, the SEC or any other claimant, upon such notice and time as the Court may direct, and that the relative priority of any deemed claim shall likewise be determined upon such notice and at such time, as the Court may direct.

* Subject to tax claims, further administration expenses and to claims under the Federal Securities Laws by participants in Counsellors' "Government Bond Plan" and "Put and Call Plan", to receive the amount of their respective investments to the extent such claims are allowed and are not satisfied out of the assets of Counsellors. As hereinafter indicated, assuming such claims are allowed (and Receiver recommends they be allowed) the assets of Counsellors will be insufficient to satisfy them, and the deficiency, consequently assertable against the assets of Advisors will far exceed Advisors' net worth. (See Par. 31 footnote, *infra*).

** All references made in said Order to Haskins & Sells account balances meant balances as of December 31, 1971, as heretofore determined by Haskins & Sells.

*** Mostly claims of trade creditors of Advisors.

DEFINITIONS OF VARIOUS TYPES OF CLAIMS AND CLAIMANTS

9. The persons referred to in the first clause of sub-paragraph 6(c) of the Court's aforesaid order of September 21, 1972, i.e., "persons who had a Haskins & Sells Plus Account Balance", are hereinafter collectively referred to as "Account Balance Claimants", and their deemed claims for the amount of such plus account balances are referred to as "Account Balance Claims".

10. Account Balance Claims under the Government Bond Plan are hereinafter called "GBP Account Balance Claims" and those under the Put and Call Plan are called "Put and Call Account Balance Claims". All other deemed claims pursuant to sub-paragraph 6(c), and all deemed claims under sub-paragraphs 6(a) and 6(b) of the said order are hereinafter collectively called "Claims for Excess of Net Investment Over Account Balance", or, for the sake of brevity, "Claims for Investment Overage". All deemed claims pursuant to paragraph 7 of the said order, and all such other or further claims, except administration and tax claims, as the Court may allow, are hereinafter sometimes collectively called "General Claims", and the claimants entitled thereto are hereinafter sometimes called "General Claimants".

11. As of the critical date, a number of "puts" purchased by various Put & Call Plan participants were still open and unexercised. Since some of these later became exercisable at a profit, the Fiscal Agent, at the request of the interested participants, exercised them. The names of these participants and their respective profits, which totaled \$1,254.82 in all, are set forth in Exhibit 1 hereof. These participants are called "Put Profit Takers" and their claims for the aforesaid profits "Put Profit Claims".

12. As of the critical date, certain persons had deposited monies with Counsellors intended by both the depositors and by Counsellors for investment in the next Government Bond Plan syndicate to be formed. The advent of Court administration of Counsellors' affairs, and restraint of its further active operations, prevented any further syndications and the money remained on deposit. These investments aggregated \$30,369.55. An itemized list of the investors (hereinafter called "Abortive GBP Investors") and their claims (hereinafter called "Abortive GBP Claims"), is attached as Exhibit 2 hereof.

RECOMMENDATIONS AS TO ALLOWANCE OF CLAIMS

13. For reasons hereinafter discussed in greater detail, Receiver, having consulted with and upon the advice of his counsel, recommends as follows:

A. That all GBP Account Balance Claims, PC Account Balance Claims and Claims for Investment Overage be allowed (subject to the recommended priorities hereinafter set forth) as claims against Counsellors, without the necessity of further proof thereof, and, to the extent hereinafter set forth in paragraphs 19 and 20 hereof, as claims against Advisors.

B. That all other deemed claims and all claims, other than deemed claims, as Receiver has heretofore approved (such deemed or Receiver-approved claims being set forth in Exhibit 3 hereof) be allowed (subject to the recommended priorities hereinafter set forth) as against either Advisors only or Counsellors only as indicated in such Exhibit.

C. That all "claims for excess" made pursuant to paragraph 8 of the aforesaid order of September 21, 1972, which claims are listed in Exhibit 4 hereof, be deemed timely filed, but be summarily disallowed in their entirety, on their merits.

D. That all claims (other than the "Claims for excess" referred to in "C" above) heretofore rejected by the Receiver (which claims are set forth in Exhibit 5 hereof) be disallowed subject to the submission of such further proofs, if any, and such hearing, if any, as the Court may deem appropriate.

E. That all Put Profit Claims be allowed in the respective amounts set forth in Exhibit 1 hereof and that all Abortive GBP Claims be allowed in the respective amounts set forth in Exhibit 2 hereof.

ANALYSIS OF REASONS FOR RECEIVER'S RECOMMENDATIONS AS TO ALLOWANCES OF CERTAIN CLAIMS

14. The amounts of the respective Account Balance Claims and claims for Investment Overage of the various Account Balance Claimants are based upon the initial Haskins & Sells report to the Court and on computations made by the Receiver's staff, both of which, in turn, were based upon Counsellors' books and records. Consequently, it would not, in Receiver's opinion, serve any useful purpose to require these claimants to submit proof as to the amounts of their claims. Furthermore, for reasons which will be set forth in Receiver's Counsel's Memorandum of Law to be filed herein, Receiver has concluded that no proof of reliance upon particular misrepresentations, or upon any omissions to state material facts, should be required of Government Bond Plan or Put & Call Plan participants, either in respect to their Account Balance Claims or their Claims for Investment Overage.

15. The Receiver's report herein dated November 10, 1972 at page 4 hereof, lists a number of Claims for "Excess" filed by GBP and PC Plan participants pursuant to Paragraph 8 of this

Court's order of September 21, 1972. Although a number of these claims were filed later than the bar date, the time lapse was not great and Receiver accordingly recommends that such claims should not be barred for lateness, but should be considered on their merits. However, Receiver recommends that they be denied on their merits in that all of them, other than the claims of Harry M. Tonkin and Hudson Rosenblatt, appear to be embraced by the "deemed" claims of the respective participants, or, in other words, claims as to which, pursuant to this Court's order of September 21, 1972, no proof need be submitted by the claimant absent a specific court order to the contrary.

16. The claim of Hudson Rosenblatt is in the sum of \$20,276.74. Of this amount, \$6,000 is embraced in Mr. Rosenblatt's "deemed" claim for Investment Overage. The balance thereof appears to be unjustified on its face, and the Receiver has rejected it. The claim of Harry M. Tonkin is in the nature of a request for adjustment of an obvious arithmetical error in the original computation of his account balance. The error has been rectified on the books of Counsellors so that no further consideration of Mr. Tonkin's claim is necessary, it now being considered as a "deemed" claim.

RECOMMENDATION AS TO PRIORITY OF CLAIMS

17. For reasons likewise hereinafter more fully discussed, Receiver, having consulted with and upon the advice of his counsel, recommends that in distributing Counsellors' cash, first priority be accorded to Counsellors' unpaid administration expenses, including, among other things, Advisors' claim against Counsellors for reimbursement for sums heretofore advanced by Advisors on Counsellors' behalf for administration expenses, tax claims and Court-approved reserves for such further administration expense and taxes as may be reasonably anticipated; and that the remaining cash balance, together with the non-cash assets of Counsellors, be divided into two separate and distinct funds, one, hereinafter called the "General Fund", consisting of cash in the sum of \$89,025. Counsellors' tax refunds receivable, which were valued at \$20,496.14 as of March 31, 1973, and the stock of Advisors; and the other, hereinafter called the "GBP Fund", consisting of the rest of Counsellors' cash. Receiver further recommends that the GBP Fund, be utilized, in its entirety, to satisfy GBP Account Balance Claims, *pro-rata*.

18. Receiver further recommends that, to the extent that the GBP Fund is insufficient to satisfy the GBP Account Balance Claims in full, claims for such deficiency (herein referred to as "GBP Account Balance Deficiency Claims") shall, together with the allowed PC Account Balance Claims, Claims for Investment Overage, and General Claims against Counsellors be satisfied, *pro-rata* and *pro tanto*, out of the assets, other than the stock of Advisors, constituting the General Fund.

19. Receiver further recommends that to the extent that the allowed claims referred to in paragraph 18 above are not satisfied in full out of the GBP Fund and the assets, other than the stock of Advisors, constituting the General Fund, such claims shall be satisfied out of the assets of Advisors in the manner provided in the following paragraph 20 hereof.

20. Receiver further recommends that the assets of Advisors (which, with insignificant exceptions, consist solely of cash or its equivalent aggregating approximately \$247,000) be applied first to pay Advisor's unpaid administration expenses and such tax claims as are allowed, and to establish Court-approved reserves for such further administration expenses and taxes as may be reasonably anticipated, and that the remaining balance be distributed in payment, *pro-rata* and *pro tanto*, of all allowed claims against Advisors (including GBP Account Balance Deficiency Claims, PC Account Balance Claims, Claims for Investment Overage, General Claims against Counsellors, and General Claims against Advisors).

22. Receiver further recommends that Put Profit Claims be paid in full to the respective Put Profit Takers, as a first charge against the GBP Fund.

ANALYSIS OF REASONS FOR THE RECEIVER'S RECOMMENDATIONS CONCERNING PRIORITY OF CLAIMS

23. Attached hereto as Exhibit 6 hereof, and hereinafter sometimes referred to as the "Haskins & Sells March 31, 1973 report" are copies of statements of realization and liquidation in respect to Counsellors and Advisors, for the period December 31, 1971 through March 31, 1973, and a statement of Counsellors' cash receipts and disbursements during the same period, as prepared by Haskins & Sells. That firm, as the Court-appointed accountants for Counsellors and Advisors, had made its first report as to their financial condition as of the close of a fiscal year ended March 31, 1971.** The Haskins & Sells March 31, 1973 report, as supplied by the within petition and report, is hereby adopted as the Receiver's account for the period covered thereby.

* If the Receiver's recommendations are followed the allowed claims against Advisors will far exceed the value of Advisors' assets, and accordingly Advisors' stock will be worthless. See Court's order of September 21, 1972, *supra*, and paragraph 31 *infra*.

** Copies of the Haskins & Sells financial reports relating to Counsellors and Advisors, as of March 31, 1971, June 30, 1971 and December 31, 1971 are attached to this Court's Order to Show Cause herein, dated May 8, 1972, copies of which were served on the "known claimants" referred to therein. The Receiver will be pleased to furnish further copies to any claimant upon written request.

24. The Receiver has caused an analysis to be made by his staff, with the cooperation of Haskins & Sells, in order to determine what portion, if any, of the assets of Counsellors, as of March 25, 1971, which was the date (hereinafter sometimes called the "critical date") of inception of Court jurisdiction over the assets and affairs of Counsellors and Advisors, should be considered as a separate trust fund (the "GBP Fund") for the benefit of any particular class of claimants as distinct from the portion of Counsellors' assets which should be considered as available to all of its creditors (the "General Fund").

25. Such analysis revealed that, as of the critical date Counsellors had three bank accounts, one entitled "Government Securities Division Account" maintained at Chase Manhattan Bank, another entitled "Regular Account" maintained at the same bank, and a third, bearing no particular title, maintained at Chemical Bank New York Trust Company. The last two accounts mentioned had balances of \$46,695 (Chase) and \$21,853 (Chemical) as of that date.

26. Counsellors' books of account disclosed that commencing at least as early as January 1, 1970, about fifteen months prior to the critical date, the cash balances maintained in these two accounts were derived largely, if not entirely, from the proceeds of subscriptions to the stock of Counsellors, and that neither of such accounts was treated as a repository of funds belonging to its customers. Hence the Receiver has concluded that the aggregate amount of the balance of these two accounts as of the critical date (\$68,548) should be deemed a general asset of Counsellors as of that date, and that, since the amount of said balances has continued to form part of the administration assets in his hands, first as fiscal agent and later as Receiver, \$68,548 of Counsellors' cash on hand as of March 31, 1973, should be deemed to be a General Fund asset, attributable to the aforesaid bank accounts.

27. It further appears that as of the critical date Counsellors had the following non-cash assets, and that none of such assets was ever treated as the property of its customers:

		Critical Value
Receivable from GBP customers	\$ 3,737	
Receivable from Put & Call customers	15,865	
	<u>\$19,602</u>	
Plus corrective adjustments made by Haskins & Sells	2,136	
Total receivables from customers		\$21,738
Refundable income and franchise taxes	\$26,761	
Plus corrective adjustment made by Haskins & Sells	<u>1,235</u>	
Total refundable taxes		\$27,996
Investment in shares of Atlantic Fund		4,040
Investment in shares of Advisors		<u>—0—</u>

28. From the critical date through March 31, 1973 a total of \$8,899 of the receivables from customers was collected by the Receiver. The balance of \$12,839 has been written off as uncollectible since the expense of proceeding against the many participants involved would far exceed the foreseeable recovery. Receiver accordingly recommends that \$8,899 of Counsellors' cash on hand as of March 31, 1973, be deemed to be a General Fund asset, attributable to receivables from customers.

29. The shares of Atlantic Fund were sold by the Receiver during the course of administration and yielded net proceeds of \$4,078, slightly more than the critical date value of these shares. Since the said sum of \$4,078 has continued to form part of the assets in the Receiver's hands, Receiver recommends that \$4,078 of Counsellors' cash on hand as of March 31, 1973, be deemed to be a General Fund asset attributable to shares of the Atlantic Fund.

30. \$7,500 of Counsellors' tax refund claims accrued as of the critical date have been collected and the balance of \$20,496 remains unpaid, although Receiver is advised that eventual collection thereof is likely. Since both the amount collected and the amount unpaid have continued to form part of the receivership assets Receiver recommends that, as of March 31, 1973, \$7,500 of Counsellors' cash, attributable to a tax refund heretofore made, and a claim for a further tax refund of \$20,496, be deemed to be General Fund assets.

31. Hence, to recapitulate, Receiver recommends that as of March 31, 1973 and thereafter, the General Fund of Counsellors be deemed to consist of the following assets:

* See footnote to paragraph 31, *infra*.

Cash

Attributable to Counsellors' Regular Account at Chase Bank and its account at Chemical Bank	\$ 68,548
Attributable to collections of receivables from customers	8,899
Attributable to Atlantic Fund shares	4,078
Attributable to tax refunds collected	<u>7,500</u>

Total Cash \$ 89,025

Non-Cash

Attributable to claims for tax refunds	\$ 20,496
Attributable to shares of Advisors	<u>199,519*</u>

Total Non-Cash \$220,015

32. Further analysis disclosed that, as of the critical date, Counsellors was indebted to some fourteen banks, located in various parts of the country, in the aggregate principal amount of approximately \$65,000,000, for loans made on behalf of the various Government Bond Plan syndicates which it had organized for the purpose of acquiring and holding short term U.S. Treasury Bills and eventually "switching" these into long-term government obligations. In each instance, the Treasury Bills were pledged to the respective bank as security for the respective loan. Haskins & Sells has advised that, as of the critical date, there was "cash in transit" to Counsellors from these banks aggregating \$3,312,107, representing the equity of the GBP participants in the net proceeds of the Treasury Bills, after payment of the loans secured thereby.

33. The aforesaid cash in transit was received by Counsellors during the month of April 1971, commencing after the entry of the Court Order of April 2, 1971 directing the liquidation of the loans and placing the administration of Counsellors under the jurisdiction of a Court-appointed fiscal agent.** The banks and the fiscal agent were, by the terms of the said Order, authorized and empowered to treat the net proceeds of the liquidation of the loans as being "for the benefit of public investors in [Counsellors'] Bond Plan." Receiver, for reasons which will be set forth in Receiver's Counsel's memorandum of law, has concluded that the amount of the aforesaid "cash in transit" (\$3,312,107.71) should be deemed impressed with a trust in favor of GBP Account Balance Claimants, and, accordingly, part of the GBP Fund, as should the aggregate net equity of \$647,861 (See Paragraph 39, *infra*), as of the critical date, of the GBP syndicates liquidated thereafter.

34. As aforesaid, Counsellors' "Government Securities Division" bank account had a balance of \$459,748, as of the critical date. Receiver caused an extensive analysis of Counsellors' records to be made by his staff, in consultation with Haskins & Sells, to determine whether this balance, like the "cash in transit", should be considered held in trust for the benefit of GBP Account Claimants, and accordingly, part of the GBP Fund. To this end, an investigation was made to determine, insofar as possible and practicable, the sources of the balance in this account and the manner in which the account was administered prior to the critical date.

35. It appeared from such investigation that, other than for a payment of \$100,000 made out of the "Regular Account" into the "Government Securities Division Account" early in 1970, which was apparently intended to be in the nature of an investment of "stockholders' money" in the Government Bond Plan, the sources of the balance in the Government Securities Division Account were (with exceptions that the Receiver, on advice of his counsel, does not consider significant) confined to payments by subscribers to the Government Bond Plan constituting their respective investments in that Plan, the proceeds of the bank loans above referred to, and the proceeds of the Treasury Bills purchased with the proceeds of such loans, as such bills matured. The Receiver is further advised by his counsel, and so recommends, that although the issue is not free from doubt, the aforesaid balance in the Government Securities Division Account as of the critical date should be considered as subject to a trust in favor of GBP Account Balance Claimants, and hence part of the GBP Fund. It appears that the \$100,000 "investment of stockholders' money" from the Regular Account was more than fully repaid to the Regular Account by the Government Securities Division Account in the year in which the investment was made. Receiver's counsel advises that the fact that \$100,000 of stockholders' money was, until such repayment, intermingled, in whole or in part, with the moneys derived from subscriptions of GBP Claimants, and the further fact that in some instances moneys in this account may have been used for non-trust purposes, should not tip the scales against a finding that the account balance in question constitutes in trust for the benefit of

* Due to Receiver's sale of Advisor's assets at a favorable price in November of 1972, its stock, which had been considered valueless as of the critical date, had a book value (comprised almost entirely of cash) of \$199,519 as of March 31, 1973 as per Haskins & Sells statement as of that date. Note, however, that the said book value of Advisors' shares does not take into account the claims against Advisors, totalling many times that amount, made by participants in Counsellors' GBP Plan and Put & Call Plan, to the extent such claims may be allowed by the Court and are not satisfied out of Counsellors' assets.

GBP Account Balance Claimants, and Receiver is in accord with this view. No similar account segregation or fund earmarking was made with monies received or disbursed for PC Account Balance claimants, whose transactions were customarily handled through Counsellors' "Regular Account", in which the funds of Counsellors itself were continuously and consistently inextricably intermingled with proceeds received from Put and Call participants, and, on occasion, from Put and Call houses with which Counsellors' Put and Call transactions were consummated. Consequently Receiver finds no similar justification to impress any part of Counsellors' assets with a trust in favor of participants in the Put & Call Plan.

36. Two other relatively large items, both constituting assets on hand as of the critical date, should also, in the opinion of Receiver and his counsel, be deemed to be part of the GBP Fund as of that date. The first is a non-interest bearing Certificate of Deposit in the sum of \$180,000, which was held by one of the lending banks as additional collateral for a GBP syndicate loan. This certificate was redeemed by the issuing bank on or about April 20, 1970 and the proceeds applied toward payment of the loan. The other item is \$100,000 in commercial paper issued by Singer Credit Company, which became due and was paid on April 7, 1971. Counsellors' books of account reflect that this commercial paper, although not attributable to any particular loan syndicate, was very short-term paper which had been purchased with funds from the Government Securities Division Account at a time when the entire "stockholders' investment" of the Regular Account in the Government Securities Division Account had been repaid in full.

37. The reason for permitting the Put Profit Takers to be paid in full, out of the GBP Fund, is that their profit was in its entirety earned during the course of the administration of the Receivership Estate.

38. The reason for putting the GBP Abortive Claimants on a parity with GBP Account Balance Claimants is that their investments were deposited, when received, into the Government Securities Division Account and it may be fairly presumed that only the advent of Court administration of Counsellors' affairs and restraint of its further operations prevented these investments from becoming a part of the assets of a Government Bond Plan syndicate.

39. Recapitulating the breakdown of Counsellors' assets between the GBP Fund and the General Fund as of the critical date, it is as follows:

GBP Fund	
Cash in transit	\$3,312,107
Cash on hand in Government Securities Division Account	459,748
Certificate of Deposit	180,000
Commercial paper	99,930*
Net Equity in those of GBP syndicates as were liquidated after the critical date	647,861**
Total GBP Fund	\$4,699,716
General Fund	
Cash	\$89,025
Claims for tax refunds	20,496
Total General Fund	109,521***
Total of GBP Fund and General Fund	\$4,809,237

40. As of March 31, 1973 Counsellors' cash on hand (including \$4,052 in accrued interest on time deposits which have since matured) aggregated \$2,043,884.**** It is obvious that in any recommendation as to the manner of distributing Counsellors' March 31, 1973 cash and non-cash assets, there must be taken into account not only the aforesaid sum of \$2,043,884, but also the further cash sum of \$3,033,584 theretofore distributed on account, to GBP Account Balance Claimants. (See statement of cash receipts and disbursements forming part of Haskins & Sells 3/31/73 report.) The resulting total is \$5,077,468.

* Valued as of the critical date.

** See Haskins & Sells 3/31/71 report. Amount shown is the excess of the cost of Treasury Bills on hand (\$14,833,651) over the loans payable (\$13,866,057) and the accrued interest on such loans (\$319,733).

*** Exclusive of Advisors' stock, which was valueless as of the critical date.

**** Inclusive of \$4,532 in accrued interest on time deposits. Since these time deposits have matured since 3/31/73, the accrued interest will be treated as cash for purposes of this petition.

41. To this should be added the claims for tax refunds valued at \$20,496 as of March 31, 1973 (see paragraph 39 *supra*) and there must be deducted the sum of \$88,160 representing administration expenses heretofore paid by and reimbursable to Capital Advisors Inc. and the further sum of \$94,898 in other administration expenses accrued as of March 31, 1973 (See Haskins & Sells report of March 31, 1973).

42. Thus, before making allowance for further (i.e., post 3/31/73) administration expenses, including further estimated income tax liability, the net assets of Counsellors available for distribution to all pre-administration claimants come to approximately \$4,915,000. Receiver estimates that the aggregate amount of the further administration expenses of Counsellors (including further income tax liability)** will not exceed \$120,000. On this assumption, it is safe to assume that at least \$4,795,000 will be available for distribution, out of Counsellors' assets, to all claimants against Counsellors, and that this amount is represented almost entirely by cash or assets which are the substantial equivalent of cash. In addition, as indicated hereinabove, almost \$200,000 more has become available to Counsellors' GBP and PC participants out of the assets of Advisors, which, as of the critical date, had had only relatively nominal assets. Thus the total assets now available to Counsellors' creditors come to about \$4,995,000. The aggregate amount available to Counsellors' creditors as of the critical date was about \$4,809,000 (See paragraph 39 *supra*). It appears therefore, that the total assets which are now available to Counsellors' creditors, after payment of all of Counsellors' expenses from the critical date until the termination of the Receivership, are at least \$186,000 greater than the assets which were available to Counsellors' creditors as of the critical date.

43. Receiver, on the advice of his counsel, has concluded that all income of Counsellors heretofore and hereafter received and accrued, since the critical date, from whatever source derived, should be credited to the GBP Fund; and that all the administration expenses of the Fiscal Agent and the Receiver should be charged against that Fund. The reason for this recommendation is that the amount of bookkeeping involved in making an exact allocation would be completely disproportionate in view of the large total (about \$4,430,000, as set forth in Par. 46, *infra*) of the claims against the General Fund and its relatively small size (only about \$109,000 if we assume, as Receiver recommends, that the Advisors' stock has no present value). Indeed, any proportionate allocation of income and expenses as between the General Fund and the GBP Fund would result in only miniscule differences to those entitled to share in the respective Funds.

44. If the Court approves the foregoing recommendations of the Receiver, the cash available for distribution to GBP Account Balance Claimants out of Counsellors' assets, as of March 31, 1973, was \$2,043,884, less the following sums, aggregating approximately \$392,083, leaving a cash balance of about \$1,651,801:***

- \$89,025 attributable to the General Fund (See paragraph 31, *supra*).
- \$88,160 payable by Counsellors to Advisors to reimburse the latter for administrative expenses heretofore paid by it for Counsellors.
- \$94,898 constituting a reserve for claimed administration expenses through March 31, 1973 for legal and accounting fees and Receiver's fees, all subject to Court approval (See Haskins & Sells 3/31/73 report);
- Reserve for further income tax claims, estimated at \$20,000.
- Reserve for administration expenses incurred and to be incurred from March 31, 1973 to termination of Receivership, estimated at \$100,000.

45. Based on these assumptions and reserves, the balance of \$1,651,801 will be available for distribution to GBP Account Balance Claimants out of Counsellors' cash. Since \$3,033,584 has already been distributed to those claimants on account a total of \$4,685,385 will thus be paid to them. This amount, which is the estimated net balance of the GBP Fund, represents approximately 93% of the total GBP Account Balance Claims (which, as adjusted to March 31, 1973, but before deducting the aforesaid payments on account, total \$5,061,882).****

* For purposes hereof the Advisors' stock must be treated as worthless at 3/31/73 as well as at the critical date (See footnote to paragraph 31, *supra*).

** As reflected in Haskins & Sells 3/31/73 report, the Internal Revenue Service audit deficiencies for the tax years 1968 and 1969, aggregating approximately \$371,000 have been tentatively settled for \$25,144, plus interest, and, in the opinion of Haskins & Sells and of Receiver's counsel, neither Counsellors nor Advisors will be held to have any significant liability under the further tentative IRS income tax assessments aggregating \$350,000 for the tax years 1970 and 1971.

*** For convenience, and in light of their relatively insignificant total (\$1,254,82); the Put Profit Claims, which Receiver recommends be paid in full out of the GBP Fund (See Paragraphs 11 and 22) have not been taken into account in the above computation.

**** As reflected in Haskins & Sells 3/31/73 report.

***** This estimate and the corresponding estimate for Advisors in Paragraph 48 hereof assume that no protracted litigation or lengthy Court hearings will ensue herein.

46. Since, as aforesaid, the estimated net balance of the GBP Fund will be \$4,685,385 its utilization to pay the GBP Account Balance Claims *pro tanto* will reduce the unpaid balance of those claims to \$376,497. This unpaid balance of GBP Account Balance Deficiency Claims should first be satisfied out of the assets, other than the Advisors' stock, comprising the General Fund, as should the PC Account Balance Claims, the Claims for Investment Overage, and the General Claims against Counsellors. (See Paragraph 18, *supra*). Thus, the estimated total amount of the claims assertable against the General Fund would be as follows:

GBP Account Balance Claims, to the extent not satisfied by the GBP Fund (GBP Account Balance Deficiencies)	\$ 376,497
Claims for Investment Overage by GBP participants computed as follows:	
GBP Net Investments	\$7,393,888*
Less GBP Account Balance Claims	\$5,061,882**
GBP Claims for Investment Overage	2,332,006***
PC Account Balance Claims	79,341**
PC Claims for Investment Overage, as follows:	
PC Net Investments	1,672,839*
Less PC Account Balance Claims as above	79,341
PC Claims for Investment Overage	1,593,498***
Estimated General Claims against Capital Counsellors, Inc.	50,000
Estimated total claims assertable against General Fund	\$4,431,342

47. The aggregate value of the General Fund, including both cash and non-cash assets, but attributing no value to the Advisors' stock for reasons hereinabove stated, is \$109,521. (See Par. 31, *supra*). Thus, it will be seen that the above claimants against the net General Fund, who would be entitled to share in the General Fund on a *pro-rata* basis (See Par. 18, *supra*), would receive, on the basis recommended by the Receiver, approximately 2% of their respective claims against the General Fund.

48. Proceeding to the manner in which the assets of Advisors should be distributed, it will be seen from Haskins & Sells March 31, 1973 report concerning Advisors that, as aforesaid, almost all of its assets are cash, or, in respect to the asset entitled "Accounts Receivable from Capital Counsellors, Inc." the equivalent of cash, and that such assets total approximately \$247,000. As indicated in the report, Advisors' liability for administration expenses as of March 31, 1973 (that is, liabilities incurred subsequent to March 25, 1971), total \$26,557. Receiver estimates that Advisors' further administration expenses, from April 1, 1973 through the termination of Receivership will not exceed \$25,000 and recommends that a reserve therefor be set up in that amount. Thus, deducting from Advisors' assets of \$247,000, its accrued administration expenses as of March 31, 1973 and the aforesaid \$25,000 reserve for administration expenses, the resulting net assets of Advisors available for distribution to its creditors total approximately \$195,000. The claims assertable against these net assets would be approximately as follows:

Unsatisfied balance of GBP Account Balance Claims—	
\$376,000 less 2% (about \$7,500) or about	\$ 368,000
Unsatisfied balance of GBF Claims for Investment Overage—	
\$2,332,000 less 2% (about \$47,000) or about	2,282,000
Unsatisfied balance of PC Account Balance Claims—	
\$79,000 less 2% (about \$1,600) or about	78,000
PC Net Investment Overage—	
\$1,593,000 less 2% (about \$32,000) or about	1,559,000
Estimated General Claims against Capital Advisors, Inc.	21,000
Estimated total claims assertable against net assets of Advisors	\$4,308,000

Thus, the above claimants against the net assets of Advisors (such assets, as aforesaid, total about \$195,000), who would be entitled to share in such assets on a *pro rata* basis (See Pars. 19-20, *supra*) would receive, on the basis recommended by the Receiver, approximately 4.5% of their respective claims against such assets.

* As computed by Receiver's staff, adjusted to date.

** As per Haskins & Sells 3 31 73 report.

*** These amounts are before deduction of minus Haskins & Sells account balances aggregating \$4,453 in the case of GBP Claims for Investment Overage and \$7,587 in the case of PC Claims for Investment Overage. Upon reconsideration Receiver believes that no such deductions should be made, and so recommends. In any event the net effect of making such deductions would be minimal.

49. Accordingly, the Receiver estimates that the GBP Account Balance Claimants, on the basis recommended by the Receiver, would therefore receive total cash distributions of at least 97% of their claims, computed as follows:

To be received on claims against the GBP Fund	\$4,685,385
To be received on claims against the General Fund for GBP Account Balance Deficiencies—	
2% of \$376,000 or about	7,500
To be received on claims against the General Fund for GBP Investment Overage—	
2% of \$2,332,000 or about	47,000
To be received on claims against the assets of Advisors computed as set forth below	119,000
GBP Investment Overage	\$2,332,006
Plus	
GBP Account Balance Deficiencies	376,497
	\$2,708,503
Less:	
To be received from GBP Fund on account of Account Balance Deficiencies	7,500
To be received on claims against the General Fund for GBP Investment Overage	47,000
	54,500
	\$2,654,003

\$2,654,003 x 4.5% = (approx.) \$119,000

\$4,858,885

Since the aggregate GBP Account Balance Claims come to \$5,061,882 (See Par. 45, *supra*) the estimated aggregate cash to be received thereon (\$4,858,885) comes to about 96% thereof. This estimate is conservative in that it does not take into account the eventual collection of tax refunds payable or the income from the assets of the receivership from March 31, 1973 until final distribution. These items should increase the distributions to GBP Account Balance Claimants by at least another 1% of their respective claims.

50. It is further estimated that GBP Claimants for Investment Overage who have no GBP Account Balance claims, PC Account Balance Claimants and PC Claimants for Investment Overage would receive about 2% of their respective claims payable out of the General Fund, and, roughly, another 4% out of the net assets of Advisors; and that the General Claimants against Counsellors would receive about 2% of their claims and the General Claimants against Advisors about 4% of their claims, respectively.

REMOVAL OF CERTAIN RESTRAINTS

51. The aforesaid order of this Court dated April 2, 1971 provided that the defendants Weiss deposit certain funds into a special escrow account for the benefit of the customers of the corporate defendants, subject to further order of the Court. Following the initial deposit of \$7,000 into this account, no further deposits were made therein, since the practical effect of the Court's subsequent order of May 7, 1971 was to permit further Weiss contributions to be made directly to Counsellors and Advisors (which were then under Court supervision) rather than into the said escrow account. Your petitioner has nevertheless continued to maintain the aforesaid \$7,000 in the aforesaid account, and since the purpose of the special escrow no longer exists, prays that he be relieved and discharged therefrom and that he be permitted to close out the aforesaid special escrow bank account (which is maintained at Chase Manhattan Bank, 1 Chase Manhattan Plaza entitled "Sydney B. Wertheimer, as Receiver—Weiss Indemnity Account No. 910-1-363415") and deposit the proceeds into any other demand or time deposit account now or hereafter maintained by the Receiver for the benefit of Counsellors.

52. Reference is made to a certain contract dated September 15, 1971, between the Receiver and Netgo Ltd., a New York corporation, pursuant to which the Receiver sold to Netgo Ltd. a certain publication known as "Money and Credit Reports" and certain other assets. Paragraph 6 of the said contract (which contract was approved by this Court's Order herein dated and filed October 8, 1971) provides that the Receiver maintain, for the purpose of defraying certain claims for refund made by subscribers to Money & Credit Reports more particularly set forth therein, a certain fund entitled "Subscription Indemnity Fund". Paragraph 8(b) of the said contract provides that "Any balance of the Subscription Indemnity Fund not required to pay claims for refunds duly submitted to the Receiver on or before January 31, 1972 shall be retained by the Receiver for the use and benefit of the Receivership Estate, free from any claim of the Purchaser".

53. The aforesaid Court order of October 8, 1971 approving the said contract, provided in part as follows:

"It is further ordered, that neither the establishment of the Subscription Indemnity Fund referred to in the Contract nor the assumption by the purchaser of the obligation, more particularly provided in the Contract, to personally refund the unearned portions of subscription payments to cancelling subscribers to "Money and Credit Reports" shall, in the event that the Subscription Indemnity Fund shall prove insufficient for such purpose and the purchaser shall fail to personally make such payments, relieve Capital Advisors, Inc. from such obligations as it may have with respect thereto, and it is further

ORDERED that the entire proceeds, in excess of \$100,000, of any sale of Capital Advisors, Inc. shall be placed in escrow by the Receiver, who may invest such proceeds in short term time deposits or government securities. Such escrow fund shall be held subject to further order of this Court."

The proceeds of the aforesaid sale totalled \$150,000. Pursuant to the said contract and the said order, the Receiver established two special bank accounts both at Chase Manhattan Bank, 1 Chase Manhattan Plaza, one entitled "SYDNEY B. WERTHEIMER—As receiver for Capital Advisors, Inc. Money and Credit Subscription Indemnity Fund Time Deposits" (hereinafter called "Subscription Indemnity Account No. 1") in the original amount of \$100,000, and the other entitled "SYDNEY B. WERTHEIMER—As receiver for Capital Advisors, Inc. Money and Credit Supplementary Escrow Time Deposit" (hereinafter called "Subscription Indemnity Account No. 2") in the original amount of \$50,000.

54. All of the claims for refund made by subscribers to Money & Credit Reports, and duly and timely submitted to Receiver, were promptly paid in full out of the Subscription Indemnity Account No. 1, and substantial balances remain both in that account and in Subscription Indemnity Account No. 2. Neither Netgo, Ltd., nor Macro Publishing Corp. its wholly owned subsidiary, which succeeded to its rights and assumed its obligations under the contract nor any subscriber to Money & Credit Reports has made any other or further claim against Receiver within the time permitted therefor.

55. Accordingly, Receiver prays that he be released and discharged from any and all liability to Netgo Ltd. and Macro Publishing Corp., and to any successor of either of them, and from any and all liability to any subscriber to Money & Credit Reports, with respect to any such refund, and that he be permitted to close out the aforesaid Subscription Indemnity Accounts Nos. 1 and 2 (more specifically referred to in paragraph 53 hereof) and deposit the proceeds thereof in any other account now or hereafter maintained by him in the name of, or for the benefit of Advisors.

56. For bookkeeping convenience the funds in the "Weiss Indemnity Account" have despite their "escrow" designation been considered, in the periodic reports rendered by Haskins & Sells and the Receiver, as part of the assets of Counsellors, and likewise the funds in the Subscriptions Indemnity Accounts Nos. 1 and 2 have been considered in such reports as part of the assets of Advisors. Hence the lifting of any restraints with respect to the said three bank accounts will have no effect on the aforesaid computations with respect to the distribution of the available assets of either Company. During the early stages of the Receiver's tenure as fiscal agent for Counsellors and Advisors, certain other bank accounts of Counsellors and Advisors, including, but not limited to, the account of Counsellors at Chase Manhattan Bank bearing # 910-1-362698 and the account of Advisors at the same bank bearing # 910-1-362342 were, at various times designated or referred to as "escrow" accounts. However, it does not appear that any such designation or reference was intended to create any true escrow fund or relationship, and as in the case of the other bank accounts above referred to, neither Haskins & Sells nor the Receiver have treated these accounts as anything other than part of the assets of Counsellors or Advisors, as the case may be. These accounts no longer bear any "escrow" appellation or designation, and Receiver respectfully requests, that, as in the case of the three accounts referred to [in paragraph 56] hereinabove, he be discharged of any and all liability or responsibility with respect thereto, other than to dispose of the same, or the proceeds thereof, in accordance with his general duties and responsibilities as Receiver herein.

FEES OF THE RECEIVER, HIS ATTORNEY AND HASKINS & SELLS

57. As set forth in Haskins & Sells March 31, 1973 report, the following fees were reserved for on the companies' books in respect to claimed fees accrued and unpaid, as of March 31, 1973, for services performed prior to that date.*

* Haskins & Sells' report also indicates reserves of \$11,182 against Counsellors' assets, and an additional \$10,234 against Advisors' assets, to defray the claims of Conboy, Hewitt, O'Brien & Boardman for legal services rendered to the respective corporations in the unsuccessful defense of the receivership proceedings instituted by the Securities & Exchange Commission. The aforesaid attorneys' application is presently pending.

Chargeable To	Receiver	Receiver's Attorney	Haskins & Sells	Totals
Counsellors	\$38,250	\$ 9,450	\$ 4,733	\$52,433
Advisors	4,250	1,050	—	5,300
Totals	\$42,500	\$10,500	\$ 4,733	\$57,733

58. The respective additional fees claimed for services performed during the period from April 1, 1973 through August 1, 1973 (the date of the within petition) are as follows:

Chargeable To	Receiver	Receiver's Attorney	Haskins & Sells	Totals
Counsellors	\$30,000	\$12,500	\$10,611	\$53,111
Advisors	7,500	—	1,751	9,251
Totals	\$37,500	\$12,500	\$12,362	\$62,362

The aforesaid total fees of \$62,362 for services performed from April 1, 1972 through the date of the within petition are embraced within the total of \$125,000 which Receiver has recommended (See Paragraphs 44 & 48, *supra*) as reserves for the administrative expenses of both corporations incurred during the period from March 31, 1973 to the date of termination of the receivership.

59. The Receiver respectfully prays that the claims for fees set forth in Paragraphs 57 and 58 be approved. He has examined Haskins & Sells' billings for their charges, and considers them to be reasonable in light of the services rendered, and he and his attorney will submit affidavits of their own respective services to the Court on or before September 1, 1973. Copies of these affidavits will be made available for inspection at the receivership offices. Receiver's counsel advises that his memorandum of law will be filed on or before August 17, 1973, and copies thereof will be furnished to claimants or their attorneys on request after that date.

Dated: August 1, 1973

Respectfully submitted,

/s/ SYDNEY B. WERTHEIMER
SYDNEY B. WERTHEIMER, Receiver

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

SYDNEY B. WERTHEIMER, being duly sworn, deposes and says that deponent is the Receiver in the within action; that deponent has read the within Petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

/s/ SYDNEY B. WERTHEIMER
SYDNEY B. WERTHEIMER, Receiver

Sworn to before me this
7th day of August, 1973

/s/ ELI UNCYK
ELI UNCYK
Notary Public, State of New York
No. 31-4502581
Qualified in New York County
Commission expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- :

71 Civ. 1390

CAPITAL COUNSELLORS, INC., CAPITAL
ADVISORS, INC., J. IRVING WEISS,
ABRAHAM B. WEISS, :

RECEIVER'S
SUPPLEMENTAL
REPORT

Defendants. :

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

SYDNEY B. WERTHEIMER, being duly sworn, deposes and says:

1. I am the Receiver for Capital Counsellors, Inc. ("Counsellors") and Capital Advisors, Inc. ("Advisors") in the above entitled proceeding, and make this Supplemental Report for the following purposes:

(a) to submit my accounts so as to include all transactions during the period from April 1, 1973 to December 31, 1973, inclusive, and thus enable the distribution approved by the Court's opinion of January 8, 1974 to take into account the net income of the receivership during that period;

(b) to set forth, in detail, the basis for the calculations of the aggregate amount of cash to be distributed at this time, the necessary cash reserves which must be maintained and the residual non-cash assets which remain to be collected; and

(c) to set forth the amount distributable on

account of all deemed claims (other than such trade claims, or portions thereof, as have been rejected by the Receiver), and on any claims other than deemed claims, if any, in accordance with the Receiver's recommendations approved by the Court's aforesaid opinion, and the basis for the calculation of such proposed distributions; all in support of the attached detailed order submitted to the Court for settlement in accordance with that opinion.

(d) to set forth in greater detail the reasons for Receiver's rejection of the Claims for Excess.

2. The Haskins & Sells 12/31/73 Report - Amended List of Claims.

Attached hereto as Exhibit 1 of this Supplemental Report, made part hereof, and hereinafter referred to as the "Haskins & Sells 12/31/73 Report", are copies of Statements of Realization and Liquidation in respect to both Counsellors and Advisors for the period from April 1, 1973 to December 31, 1973, inclusive, and of a supplementary letter from Haskins & Sells dated March 19, 1974. The Haskins & Sells 12/31/73 Report, as amplified by the within Supplemental Report, is hereby adopted as the Receiver's account of the transactions of the receivership for the period covered thereby.

At pp. 10-11 of the Haskins & Sells 12/31/73 Report are schedules of all timely asserted claims against Counsellors, and against Advisors, outstanding as of 12/31/73, other than GBP Account Balance Claims, PC Account Balance Claims and Claims for Investment Overage. This schedule is broken down into pre-administration claims (i.e., those asserted to have arisen prior to 3/26/71) and those asserted to have arisen on and after that date. As to each class of claim, the schedule indicates

(a) whether the claim was asserted against Counsellors, Advisors, or both;

(b) whether the asserted liability has been recorded as such on the books of account of either corporation; and

(c) whether the claim has been rejected, in whole or in part, by the Receiver.

The said schedules are hereby adopted by the Receiver to amend and supersede Exhibits 3-5, inclusive, of the Receiver's Report and Petition of August 1, 1973.

3. Computation of Distributable Cash, Reserves, etc.

(a) Counsellors.

(1) Computation of Distributable Cash Allocable to Counsellors General Fund.

As set forth at ¶39 of the Receiver's Report and Petition, at page 7 thereof (including the footnotes at page 7), \$89,025 of Counsellors' present cash is allocable to the General Fund. There are also outstanding claims for tax refunds totaling \$51,505, which, if as and when collected, will also belong to the General Fund.* In accordance with ¶43 of the Receiver's Report and Petition, no administration expenses are to be charged against the General Fund, nor is any income to be credited to that Fund. (See also ¶17, Receiver's Report and Petition.)

(2) Computation of Distributable Cash Allocable to Counsellors GBP Fund.

As set forth in the Haskins & Sells 12/31/73 Report, p. 4,

* For liquidation purposes in these proceedings, no value may be attributed to the stock of Advisors held by Counsellors, since Counsellors' assets are not sufficient to satisfy the claims of participants in Counsellors' Government Bond Plan and Put and Call Plan (which claims the Court has held are assertible against both Counsellors and Advisors) and since the amount of such insufficiency substantially exceeds Advisors' total assets. (See first footnote, p. 6, Receiver's Report and Petition.)

¶17, 43-44):

Counsellors' cash on hand as of that date was \$2,149,360 plus accrued interest receivable (since matured and collected) of \$10,618, totaling \$2,159,978. To determine the portion of this sum which is allocable to the GBP Fund, the following amounts must be deducted therefrom (see Receiver's Report and Petition, ¶¶17, 43-44):

Cash attributable to Counsellors General Fund	\$ 89,025
Payable by Counsellors to Advisors for Counsellors' share of the administration expenses paid by Advisors, plus interest thereon, through 12/31/73 (Haskins & Sells 12/31/73 Report, p. 5)	124,942*
Counsellors' accrued and unpaid administration expenses, subject to Court approval, as at 12/31/73, as per Haskins & Sells 12/31/73 Report, p. 5:	
Receiver's fees	\$68,700
Receiver's attorney's fees	26,450
Accountants' fees and disbursements	16,417
Fees claimed by Conboy, Hewitt, O'Brien & Boardman for services rendered after 3/25/71 - subject to Court approval - (Claim opposed by Receiver)	11,182
Sundry administration claims	11,177**
Reserve for estimated income taxes through 12/31/73	138,500***
Reserve for Claim (opposed by Receiver) of non-GBP pre-administration claimant against GBP Fund (Shearer claim)	12,230
	\$498,623

* This sum was paid by Counsellors to Advisors on 2/25/74.

** Of this amount, \$10,100 is reserved against claim of Aguirre Company (See Schedule 1, Haskins & Sells 12/31/73 Report).

*** \$45,000 of this amount is reflected as a Counsellors liability at p. 5 of the Haskins & Sells 12/31/73 Report. The explanation for the balance of \$93,500 is set forth in the Haskins & Sells supplementary letter dated March 19, 1974 forming part of that Report.

Carried forward from p. 4 \$498,623

Reserve for estimated administration expenses, other than fees of Receiver, Receiver's attorney and accountants for the Receivership, for expenses incurred from January 1, 1974 to the date hereof, and for further expenses through completion of the Receivership 12,500*

Reserve for possible excess of fees of Receiver, Receiver's attorney and accountants for the Receivership, during the period from 1/1/74 through completion of the Receivership, over interest income and unused other reserves 25,000

\$536,123

\$2,159,978 (the aforesaid cash on hand as at December 31, 1973) less \$536,123 leaves a remaining cash balance, allocable to the GBP Fund, of \$1,623,855. The cash heretofore distributed to GBP Account Balance Claimants came to \$3,033,584 (¶45, Receiver's Report and Petition). Therefore, the net amount of cash allocable to the GBP Fund, as of December 31, 1973, was the sum of these two amounts, namely, \$4,657,439.

(b) Advisors - Computation of Distributable Cash Allocable to Advisors General Fund.**

As set forth in the Haskins & Sells 12/31/73 Report, p. 7, Advisors, as of that date, had \$125,826 in cash plus an account receivable from Counsellors in the sum of \$124,942 (which has since been paid), making a total of \$250,768 in cash or its equivalent. Its non-cash assets, amounting to less than \$100, were

* It is estimated that at least \$7,500 of this amount will be required for expenses of printing, mailing, and computer services.

** There are to be no priorities in the distribution of funds to non-administration claimants against Advisors (see ¶20, Receiver's Report and Petition).

and are insignificant.

From the aforesaid cash of \$250,768 the following reserves must be deducted for administration expenses accrued and unpaid, subject to Court approval, as at 12/31/73 (see p. 7 Haskins & Sells 12/31/73 Report).

Receiver's fees	\$11,800
Fees of Receiver's attorney	1,550
Fees and disbursements of accountants for Receivership	1,793
Fees claimed by Conboy, Hewitt, O'Brien & Boardman for services rendered after 3/25/71	10,234
Payroll and other taxes payable	680
Sundry claims	53
Accrued office services	596
	<u>\$26,706</u>

Reserve for estimated administration expenses, other than fees of Receiver, Receiver's attorney and accountants for Receivership, from 1/1/74 through completion of Receivership 2,500

Reserve for possible excess of fees of Receiver, Receiver's attorney and accountants for the Receivership, during the period from 1/1/74 through completion of the Receivership, over interest income and unused other reserves 10,000

\$39,206

Deducting this amount from the aforesaid cash balance of \$250,768 leaves a remaining balance of \$211,562 as the net assets of Advisors as of December 31, 1973. This compares with the corresponding figure of \$195,000 which had been estimated as the amount of Advisors' net assets as at March 31, 1973 (see ¶48, Receiver's Report and Petition).

4. Basis for Calculation of Distributions to Various Classes of Claimants.

(a) Put Profit Claims.

Exhibit 1 of the Receiver's Report and Petition sets forth the names of the "Put Profit Takers" and their respective Put

Profit Claims, which total \$1,254.82. Pursuant to the recommendation set forth in ¶22 of the Receiver's Report and Petition, these claims are to be paid in full as a first charge against the GBP Fund. Deducting the aforesaid sum of \$1,254.82 from the gross amount of the GBP Fund (\$4,651,439) leaves a balance of \$4,656,184.18 which will hereinafter be referred to as the "Net GBP Fund".

(b) Claims Assertible Against Net GBP Fund.

As set forth at ¶45 of the Receiver's Report and Petition, total GBP Account Balance Claims come to \$5,061,882. This amount includes \$30,370 which, pursuant to ¶¶21 and 38 of the Receiver's Report and Petition, are Abortive GBP Claims entitled to the same priority as GBP Account Balance Claims.

In accordance with the last sentence of ¶17 of the Receiver's Report and Petition, the net GBP Fund, in its entirety, is to be utilized to satisfy GBP Account Balance Claims, pro rata. Accordingly, each GBP Account Balance Claimant will receive, out of the GBP Fund, an amount in the same proportion to his GBP Account Balance Claim as \$4,656,184.18 bears to \$5,061,882. This comes to approximately 91.985238%.

(c) Claims Assertible Against Counsellors General Fund.

As hereinabove set forth, the cash balance of Counsellors General Fund is \$89,025. As set forth at ¶18 of the Receiver's Report and Petition, the following types of claims are assertible against this fund, pro rata:

GBP Account Balance Claims, to the extent not satisfied by the net GBP Fund (GBP Account Balance Deficiencies) \$405,698

Carried forward from p. 7 \$405,698

Claims for GBP Investment Overage computed as follows:

GBP plus Net Investments	\$7,393,888*	
Less GBP plus Account Balance Claims	5,061,882**	
Claims for GBP Investment Overage	\$2,332,006	
Plus: Adjustment of total to exclude effect of Account Balances which are larger than Net Investments ..	33,124	\$2,365,130
PC plus Account Balance Claims ...		79,341**

PC Claims for Investment Overage, computed as follows (see p. 5, Haskins & Sells 12/31/73 Report):

PC plus Net Investments	\$1,672,839***	
Less PC plus Account Balance Claims, above	79,341	
PC Claims for Investment Overage	\$1,593,498	
Plus: Adjustment of total to exclude effect of Account Balances which are larger than Net Investments ..	17,486	\$1,610,984

General Claims other than Administration Claims against Counsellors, as follows: (see p. 10, Haskins & Sells 12/31/73 Report):

The Claims, recorded on Counsellors' books, which Receiver recommends be allowed	2,799
100% Reserve for those Claims, recorded on Counsellors' books, which Receiver recommends be rejected	322
100% Reserve for Claim of Landlord against Counsellors for damages and deficiencies under lease, not recorded in Counsellors' books, which Receiver recommends be rejected	83,178
Total Claims Assertible Against Counsellors' General Fund	\$4,547,452*

- * As computed by Receiver's staff, adjusted to date. (See ¶46 of Receiver's Report and Petition).
 ** As per Haskins & Sells 12/31/73 Report.
 *** As computed by Receiver's Staff (see ¶46 of Receiver's Report and Petition).
 **** As set forth at ¶¶15-16, Receiver's Report and Petition, all of the Claims for Excess appear to be completely unjustifiable on their face, and, accordingly, have not been taken into account.

As hereinabove set forth, the aggregate cash in the General Fund is \$89,025. Accordingly each claimant against Counsellors' General Fund will receive at this time, as a cash distribution on account of his claim, an amount in the same proportion to his claim as \$89,025 bears to \$4,547,452. This comes to 1.9576897%.

In addition, as was previously stated, Counsellors' General Fund has a non-cash balance of \$51,505, consisting, in its entirety, of claims for tax refunds. As, if and when these claims are collected, each claimant against Counsellors' General Fund should receive, as his pro rata share thereof, a further distribution amounting to 1.1326123% of his respective claim.

(d) Claims Assertible Against Advisors' Net Assets.

As previously stated at page 6 above, the net distributable assets of Advisors, after provision for accrued and estimated administration expenses, as at December 31, 1973, came to \$211,562, all of which is presently in the form of cash. The non-administration claims assertible against these net assets are as follows:

Claims for GBP Account Balance Deficiencies to extent not satisfied out of Counsellors' General Fund, computed as follows:

Total GBP Account Balance Deficiencies	\$ 405,698
Less: 1.9576897% thereof to be paid out of Counsellors' General Fund ...	7,942
Balance payable out of Advisors' Net Assets	\$397,756

Claims for GBP Investment Overage to extent not satisfied out of Counsellors' General Fund, computed as follows:

Total GBP Claims for Investment Overage	\$2,365,130
Less: 1.9576897% thereof payable out of Counsellors' General Fund	46,302
Balance payable out of Advisors' Net Assets	\$2,318,828

\$2,716,584

Carried forward from p. 9 \$2,716,584

Claims for PC Account Balance Claims to extent not satisfied out of Counsellors' General Fund, computed as follows:

Total PC Account Balance Claims ..	\$ 79,341
Less: 1.9576897% thereof to be paid out of Counsellors' General Fund ...	1,553
Balance payable out of Advisors' Net Assets	\$ 77,788

Claims for PC Investment Overage to extent not satisfied out of Counsellors' General Fund, computed as follows:

Total Claims for PC Investment Overage	\$1,610,984
Less: 1.9576897% thereof to be paid out of Counsellors' General Fund ...	31,538
Balance payable out of Advisors' Net Assets	\$1,579,446

General Claims against Advisors, as follows:

(see p. 11, Haskins & Sells 12/31/73 Report):

Face amount of claims which Receiver has recommended be allowed	\$21,850
Face amount of claims which Receiver has rejected, other than Claims for Excess* but including Landlord's Claim	95,657
Total General Claims Against Advisors	117,507
Total Claims Assertible Against Net Assets of Advisors	\$4,491,325

Thus, each of the claimants against the net assets of Advisors (who, as aforesaid, are entitled to share the same pro rata) will receive at this time, as a cash distribution on account of his claim, an amount in the same proportion to his claim as the net assets of Advisors (\$211,562) bear to \$4,491,325. This comes to 4.7104584%.

* As set forth at ¶¶15-16, Receiver's Report and Petition, all of the Claims for Excess appear to be completely unjustifiable on their face, and accordingly they have not been taken into account, for purposes of computing the claims assertible.

(e) Percentages of the Aggregate Amounts of the Respective Types of Claims Which Will Be Distributed, At this time, to all Claimants Thereof:

(1) GBP Account Balance Claimants Who Also Have Claims for Investment Overage

Total Distributions Payable out of Net GBP Fund (entire balance of that fund) \$4,656,184

Total Distributions Payable out of Counsellors' General Fund:

For GBP Account Balance Deficiencies, 1.9576897% of \$405,698, or ... \$ 7,942

For GBP Investment Overage, 1.9576897% of \$2,365,130, or 46,302

Total Distributions out of Counsellors' General Fund 54,244

Total Distributions Payable Out of Advisors' Net Assets:

Claims for GBP Investment Overage ..\$2,365,130

Plus: Claims for GBP Account Balance Deficiencies 405,698

Less: To Be Received out of General Fund from (a) Account Balance Deficiencies (\$ 7,942) and (b) Claims for Investment Overage (\$46,302) ... 54,244

Net Claims against Advisors' Net Assets\$2,716,584

Distribution out of Advisors' Net Assets

4.7104584% of \$2,716,584, or 127,963

Total Cash Distributions Out of GBP Fund, Counsellors' General Fund and Advisors' Net Assets: \$4,838,391

Since the aggregate GBP Account Balance Claims come to \$5,061,882 (see above) and the above total cash distributions on account thereof come to \$4,838,391, those GBP Account Balance Claimants who also have Claims for Investment Overage will receive, in the aggregate, cash distributions totaling 95.584824% of their

aggregate GBP Account Balance Claims. It must be emphasized, however, that this percentage is an average and that the exact percentage which each GBP Account Balance Claimant will receive at this time will in most cases be slightly less, or slightly more, than 95.584824% depending primarily on the relative size of the claimant's Claim for Investment Overage. However, every GBP Account Balance Claimant will receive at least 91.985238% of his GBP Account Balance Claim; this percentage being derived from his pro rata share of the GBP Fund.

(2) GBP Account Balance Claimants Who Do Not Have a Claim for Investment Overage.

There are only a few claimants in this category and, as aforesaid, each of them will receive 91.985238% of his claim, derived from his pro rata share of the GBP Fund. In addition thereto, in common with the claimants in Class (1) above, he will receive a very small additional increment of his claim attributable to his Account Balance Deficiency Claim against Counsellors' General Fund and Advisors' Net Assets.

(3) GBP Claimants for Investment Overage Who Have No GBP Account Balance Claims, PC Account Balance Claimants and PC Claimants for Investment Overage.

As hereinabove set forth, these classes of claimants are entitled to assert their claims (a) against Counsellors' General Fund, and (b) against the net assets of Advisors, and they, along with other claimants, are entitled to participate in those respective funds on a pro rata basis. As was hereinabove set forth, as claimants against Counsellors' General Fund, they are entitled to receive 1.9576897% of their respective claims, and as claimants against the net assets of Advisors they are entitled to receive 4.7104584% of the same claims. Their combined total percentage

recovery comes to 6.6681481% of their claims.*

(4) General Claims Against Counsellors.

Upon reconsideration (Cf. ¶20, Receiver's Report and Petition) general claims against Counsellors should be allowed only against Counsellors' General Fund; and not against Advisors' Net Assets. Accordingly, as hereinabove set forth, general claims against Counsellors' General Fund are entitled to a distribution of 1.9576897% of the face amount thereof. However, in the interest of conservatism, this percentage (a) assumes that all rejected general claims against Counsellors (other than Claims for Excess) will be eventually allowed in full by the Court, and (b) does not take into account the future collection of the approximately \$51,500 in tax refund claims, all of which, being attributed to the period prior to March 26, 1971, belong to the General Fund. If the bulk of the rejected claims are disallowed by the Court or the bulk of the tax refunds are eventually collected, the aggregate distributions to this class of claimants will be slightly higher.

(5) General Claims Against the Net Assets of Advisors

General claims against the net assets of Advisors are, as hereinabove set forth, entitled to distribution of 4.7104584% of the respective face amounts of such respective claims.

5. Distribution Schedules.

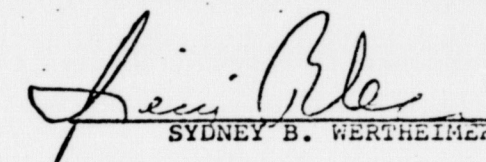
The attached Distribution Schedules, which are subdivided into Schedule A - Government Bond Plan Participants, Schedule B - Put and Call Plan Participants, and Schedules C-1 and C-2 - General

* Technically, it might be contended that, as to these claimants the amount receivable by them out of Counsellors' General Fund should be deducted from their aggregate claims and only the difference should be allowed as a claim against the net assets of Advisors. However, the differences are miniscule and have been disregarded.

Claimants, reflect the distributions recommended to each respective claimant on the basis hereof.

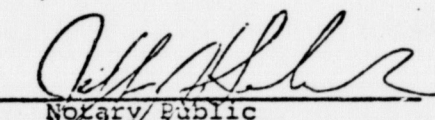
6. Detailed Summary of Reasons for Receiver's Rejection of all Claims for Excess.

Exhibit 2 of this Supplemental Report is a detailed summary of Receiver's reasons for rejecting each of the Claims for Excess.


SYDNEY B. WERTHEIMER

Sworn to before me this.

25th day of March, 1974


Notary Public
Jeffrey A. Miller
Notary Public, State of New York
Qualified in New York County
Term Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SECURITIES AND EXCHANGE COMMISSION, : U. S. District Court
 : Filed
Plaintiff, : April 23, 1974
 : S. D. of N. Y.
-against- :
CAPITAL COUNSELLORS, INC., CAPITAL : 71 Civ. 1390
ADVISORS, INC., J. IRVING WEISS, :
ABRAHAM B. WEISS, : O R D E R
 :
Defendants. :
-----x

SYDNEY B. WERTHEIMER, as Receiver for Capital Counsellors, Inc. ("Counsellors") and Capital Advisors, Inc. ("Advisors"), having duly filed his Report and Petition dated August 1, 1973 and sworn to August 7, 1973, which Report and Petition, among other things, sets forth his accounts as Receiver from January 1, 1972 through March 31, 1973, and his detailed recommendations with respect to allowance of claims and the priorities to be accorded to the various classes of claims and claimants,

And the said Report and Petition having prayed for:

- (a) the Court's approval of the said accounts,
- (b) the Court's determination as to what further proofs, if any, need be submitted by "deemed" claimants herein, and when and how such proofs should be submitted,
- (c) the Court's disposition of the "Claims for Excess" heretofore filed herein, and of such other claims as have been heretofore duly and timely submitted to the Receiver,
- (d) the Court's determination of the relative

priority to be accorded to all allowed claims, including a determination against what respective assets the respective claims should be satisfied and whether the assets of either Counsellors or Advisors should be deemed impressed with the trust in favor of any class or classes of claimants,

(e) the Court's approval of further interim allowances to the Receiver, his attorney, and the accountant for the receivership estate, and

(f) the removal of certain restraints, heretofore imposed by prior court order, on the disposition of certain other funds remaining in the Receiver's hands, and such other relief as may seem just and proper,

And the Court thereupon, by order to show cause dated August 8, 1973, having ordered all claimants against Counsellors, Advisors, or both, to show cause on September 12, 1973 why the aforesaid relief prayed for by the Receiver should not be granted, that said order to show cause be published as more particularly provided therein, and that copies thereof, together with copies of the aforesaid Report and Petition, and the exhibits thereto, be mailed or delivered to the persons specified therein, and due proof having been filed herein of such publication, and of the mailing or delivery of such copies,

And this matter having duly come on to be heard before me on September 12, 1973, and the said Receiver and his attorney, Leon Leighton, having appeared in support of the relief prayed for, and the Receiver having duly served and filed affidavits dated September 21, 1973 and October 15, 1973, and his said attorney having duly served and filed an affidavit dated

September 20, 1973, in support of the allowances claimed, and Aguirre Company, by Kramer, Marx, Greenlee & Backus, its attorneys (John J. Hayes, of Counsel) and Hudson Rosenblatt, pro se, having appeared in opposition thereto and having filed written objections, and A. R. Ketchum and Ethel E. Ketchum, by Butowsky, Schwen & Devine (Michael Devine, of Counsel) having appeared and orally objected thereto, and the Securities and Exchange Commission, by Donald M. Malawsky, Assistant Regional Administrator and Roger Deitz, Regional Attorney, having appeared without objection except as to allowances requested by the Receiver and his attorney, and Julien, Glaser, Blitz & Schlesinger, as attorneys for Donald M. Wilk, et al. (Stuart Schlesinger, of Counsel) having appeared and expressed approval of the relief prayed for, and Conboy, Hewitt, O'Brien & Boardman (David Mountan, of Counsel) having appeared pro se in opposition thereto and also having stated that, as attorney for the defendants Weiss, they had received no instructions from their clients and accordingly took no position, and no other persons having appeared or having filed objections to the said Report and Petition,

And the Receiver on September 13, 1973 having filed herein his affidavit, sworn to September 13, 1973, correcting certain typographical errors in the said Report and Petition, a copy of which affidavit, in pertinent part, is annexed hereto as Appendix I hereof,

And, after due deliberation, the Court having rendered its opinion dated January 8, 1974, approving the recommendations set forth in the Report and Petition, deferring determination of the award of fees to the Receiver and his counsel and directing that the Receiver submit the within detailed order upon notice,

in accordance with the said opinion,

And the Receiver having submitted in affidavit form, his Supplemental Report, sworn to March 25, 1974 (hereinafter the "Supplemental Report"), a copy of which is attached hereto and made part hereof, which (a) supplements his accounts so as to include all transactions from April 1, 1973 through December 31, 1973, in order to enable the distribution proposed at this time to take into account the net income of Counsellors and Advisors during that period, (b) sets forth in detail the basis for the calculations of the aggregate amount of cash to be distributed to claimants at this time and the reserves and residual non-cash assets which will remain for later distribution, (c) sets forth the amount presently distributable to each claimant on the basis of the Receiver's recommendations approved in the aforesaid opinion and embodied in the within order, and (d) sets forth, in detail, the reasons for the Receiver's recommendation that each and every Claim for Excess be disallowed by the Court, and the Receiver having filed proof of service of copies of the said Supplemental Report and of notice of settlement of the within order, upon the persons who appeared at the aforesaid hearing, or their respective attorneys,

NOW, THEREFORE, it is

ORDERED that the Receiver's accounts for the period from January 1, 1972 to March 31, 1973, and from April 1, 1973 through December 31, 1973, as set forth in the Report and Petition, as supplemented by the Supplemental Report, be, and the same hereby are, approved, and it is further

ORDERED that, subject to the further provisions of this order relating to the priority of the various classes of claims, the corporate entity, fund or assets against which each such class

of claims may be asserted and the manner of computing the distribution payable on account of each allowed claim, no further proofs need be submitted in support of any of the following claims, and that such claims be allowed as valid claims against Counsellors and Advisors:

(a) the GBP Account Balance Claims and the GBP Claims for Investment Overage, in the respective amounts, and in favor of the respective persons, set forth in Columns 2, 4 and 7 of Schedule A of the Supplemental Report;

(b) the PC Account Balance Claims and the PC Claims for Investment Overage, in the respective amounts, and in favor of the respective persons, set forth in Columns 1, 3 and 4 of Schedule B of the Supplemental Report;

(c) the following Put Profit Claims:

Martin J. Rovik and Lora P. Rovik	\$338.20
Marie P. Richards	338.20
Thomas Moss	120.12
William G. Richardson	120.12
John R. Bromley	169.09
George Maggs	169.09

(d) the following Abortive GBP Claims:

Stanley S. Bitler	\$5,062.32
Chester Gaszynski	10,124.60
Mrs. Hedwig Kirsch	5,076.94
Emaus C. Pearson	5,049.49
Theodore A. Tepke	5,056.20

(e) the sundry claims against Counsellors for goods sold and services rendered prior to March 26, 1971, set forth as such in Schedule 1 of the Haskins & Sells December 31, 1973 Report (which Report is Exhibit 1 of the Supplemental Report), except the claim indicated in such Schedule as having been rejected by the Receiver; all of such claims as were not rejected

to be allowed against Counsellors only, and not against Advisors; and

(f) the sundry claims against Advisors for goods sold and services rendered prior to March 26, 1971, set forth as such in Schedule 2 of the said Haskins & Sells December 31, 1973 Report, except to the extent such claims, as indicated in such Schedule, have been rejected by the Receiver; all of such claims, or parts of claims, as were not rejected to be allowed against Advisors only, and not against Counsellors, and it is further

ORDERED that the following Claims for Excess, which are listed in Exhibit 4 of the Report and Petition, and all of which have been heretofore rejected by the Receiver for reasons set forth in detail in Exhibit 2 of the Supplemental Report, be and the same hereby are disallowed in their entirety:

Government Bond Plan	Amount of Claim	Against
Hortense Constance Judge	\$18,444.97	Counsellors
Howard Plaut, as Trustee	3,005.31	Counsellors
Howard Plaut	24,325.44	Counsellors
Jack Greenhouse	564.69	Counsellors
Margaret Gorsuch	10,000.00	Counsellors
Norman Godfrey	17,500.00	Counsellors
Hezekiah W. Carroll	6,393.30	Counsellors and Advisors
Robert G. Michaels	11,150.00	Counsellors
Irving and Lillian Goldberg	1,633.52	Counsellors and Advisors
Sydelle Nadler	10,000.00	Counsellors and Advisors
<u>Put and Call Plan</u>		
Harry M. Tonkin	89.66	not indicated
Hudson Rosenblatt	20,276.74	Counsellors and Advisors
Margaret Gorsuch	4,926.78	Counsellors and Advisors
Sydelle Nadler	5,000.00	Counsellors and Advisors

and it is further

ORDERED that the following persons whose claims were rejected, in whole or in part, by the Receiver, as set forth in Schedule 1 and Schedule 2 of the Haskins & Sells December 31, 1973 Report, shall file with the Court, prior to May 22, 1974, a verified statement setting forth in detail the basis of such rejected claim or part thereof, upon receipt of which statements the Court shall determine whether a hearing is necessary, and if so, before whom such hearing is to be held:

Rejected Claims Against Counsellors:

Chase Manhattan Bank	\$ 322
Aguirre Company	93,278

Rejected Claims Against Advisors:

A. Rejected Pre-Administration Claims

Atlantic Fund	1,131
Bingham Seigert	59
Filtered Water	977
Mailers Photocopy Corp.	68
R. L. Polk	37
Promotion Mail Associates	107

B. Rejected Administration Claims

Filtered Water	48
R. L. Polk	5

and that after such hearing, or the Court's determination that a hearing is not necessary, the claim will be adjudicated, and it is further

ORDERED that each of the Put Profit Claims hereinabove listed be paid in full, and it is further

ORDERED that the Abortive GBP Claims are entitled to share in the GBP Fund, Counsellors' General Fund and Advisors' Net Assets on the same parity with, and with the same force and effect as if they were, GBP Account Balance Claims in the same respective amounts, and it is further

ORDERED that in light of the Receiver's rejection, as of October 30, 1971, of Counsellors' sublease from Aguirre Company,

as part of the administration expense reserves of Counsellors, to cover any claim which may be allowed for such use and occupation, is an ample reserve under the circumstances, the Receiver shall not be required to retain any other or further reserve to defray the Aguirre Company's claim for use and occupation of the premises, as aforesaid, or for any other claim or demand embraced in Aguirre Company's proof of claim filed herein, and it is further

ORDERED that fixation of the allowances of the Receiver, his attorney, and of Haskins & Sells, the accountants for the estate, be deferred until further order of the Court, and it is further

ORDERED that determination of the claims of Conboy, Hewitt, O'Brien & Boardman (other than as a general claimant against Counsellors in the amount listed in Schedule 1 of the Haskins & Sells December 31, 1973 Report), and the claim of Aaron and Virginia Shearer for approximately \$12,230, reserved for at p. 4 of the Supplemental Report, be deferred until further order of the Court, and it is further

ORDERED that the recommendations and conclusions contained in the Receiver's Report and Petition, as supplemented and modified by the Supplemental Report, with respect to

(a) the relative priority to be accorded to all allowed claims,

(b) the corporate entity, fund and assets (including, without limitation, the "GBP Fund" and "General Fund" of Counsellors and the "Net Assets" of Advisors, as therein defined and calculated), against which each class of claims may be satisfied,

(c) the basis for the calculation of the aggregate amount of cash to be distributed at this time, and

(d) the reserves to be maintained

he, and the same hereby are, ratified and approved, and without limiting the generality of the within paragraph of this Order, it is further

ORDERED that commencing as of March 25, 1971, the date of inception of this Court's jurisdiction over the assets and affairs of Counsellors and Advisors, the assets comprising the said "GBP Fund" shall, subject to the aforesaid recommendations and conclusions of the Receiver's Report and Petition and Supplemental Report, and to all the terms of the within Order, be deemed impressed with a trust in favor of the GBP Account Balance Claimants, and it is further

ORDERED that distribution be made to the following respective persons named in, and in the following respective amounts set forth in, the following Schedules of the Receiver's Supplemental Report:

Columns 2 and 14 of Schedule A;

Columns 1 and 7 of Schedule B; and

Columns 1 and 3 of each of Schedules C-1 and C-2;

and that all of the computations set forth in each of such Schedules be, and the same hereby are, approved, and it is further

ORDERED that the Receiver be, and he hereby is, discharged of any and all liability or responsibility with respect to the funds now or heretofore deposited at Chase Manhattan Bank, 1 Chase Manhattan Plaza, in each of the five accounts described and entitled as follows:

Demand Deposit Accounts:

<u>Acct. No.</u>	<u>Title of Account</u>
910-1-363415	Sydney B. Wertheimer, as Receiver - Weiss Indemnity Account
910-1-362698	Capital Counsellors Escrow Account
910-1-362342	Capital Advisors Escrow Account

Time Deposit Accounts:

Title of Account

Sydney B. Wertheimer, as Receiver for Capital Advisors, Inc. - Money and Credit Subscription Indemnity Fund Time Deposit (referred to at p. 11 of the Report and Petition as "Subscription Indemnity Account No. 1")

Sydney B. Wertheimer as Receiver for Capital Advisors, Inc. - Money and Credit Supplementary Escrow Time Deposit (referred to at p. 11 of the Report and Petition as "Subscription Indemnity Account No. 2")

other than to dispose of the same, or the proceeds thereof, in accordance with his general duties and responsibilities as Receiver herein, and that, without limiting the generality of the foregoing, the Receiver, at his discretion, may deposit the proceeds of any one or more of the aforesaid five bank accounts, or any part thereof, into any other demand or time deposit account now or hereafter maintained by the Receiver, and it is further

ORDERED that this Court continue to retain jurisdiction herein, including, without limitation, jurisdiction over the disposition of such claims rejected by the Receiver as have not been disallowed by the terms of this Order, and jurisdiction over the disposition of the assets which, after making the distributions herein provided for, will remain in the Receiver's hands, and it is further

ORDERED that notice of any such further application with respect to the distribution of such assets as the Receiver, or the Securities and Exchange Commission, may see fit to make

need be given only to the parties, hereinabove named, who appeared herein on September 12, 1973.

4/22/74

Dated: April 22, 1974

IBC

5:30 P.M.

/s/ IRVING BEN COOPER

IRVING BEN COOPER
United States District Judge

SCHEDULE C - COMPUTATION OF DISTRIBUTIONS TO GENERAL CLAIMANTS

C-1. CLAIMANTS AGAINST COUNSELLORS

(1) NAME	(2) AMOUNT OF ALLOWED CLAIM OR PORTION OF CLAIM	(3) DISTRIBUTION PAYABLE	(4) RESERVE FOR PAYMENT OF REJECTED CLAIMS- COUNSELLORS GEN FUND
CONBOY, HEWITT, O'BRIEN & BOARDMAN	\$ 2,098	\$ 41.07	
PORTLAND PRINTING	629	12.31	
CLAGGETT OFFUTT	72	1.41	
	<u>\$ 2,799</u>	<u>\$ 54.79</u>	<u>\$ 1634.67</u>

C-2. CLAIMANTS AGAINST ADVISORS

(1) NAME	(2) AMOUNT OF ALLOWED CLAIM OR PORTION OF CLAIM	(3) DISTRIBUTION PAYABLE	(4) RESERVE FOR PAYMENT OF REJECTED CLAIMS- ADVISORS NET ASSETS
BINGHAM SEIGERT	\$ 302	\$ 14.23	
DONALD M. BROWN	700	32.97	
JOHN A. BRUNS, INC	141	6.64	
BUSINESS LETTER SERVICE	3,060	144.14	
BUSINESS LETTER SERVICE, INC	3,725	175.46	
BUSINESS PHOTO-REPRODUCTIONS, INC	2,532	119.27	
CARTE BLANCHE	280	13.19	
THE COACHMAN	19	.89	
COMMERCE CLEARING HOUSE	96	4.52	
CONSOLIDATED EDISON CONST. CO.	75	3.53	
DIRECT MAIL IN NEW YORK	70	3.30	
FILTERED WATER	108	5.09	
GOLDSMITH BROTHERS	15	.71	
KING LITHOGRAPHICS, INC.	1,680	79.14	
MAILERS PHOTOCOPY CORP.	182	8.57	
MAXWELL HOUSE	30	1.41	
MOHAWK AIRLINES	18	.85	
PRENTICE HALL, INC.	137	6.45	
PROMOTION MAIL ASSOCIATES	5,149	242.54	
PHUDENTIAL BUILDING MAINTENANCE	236	11.12	
J. P. SUESS COMPANY	11	.52	
TRANSO ENVELOPE COMPANY	3,265	153.80	
WALL STREET MOVING & STORAGE	19	.89	
	<u>\$21,850</u>	<u>\$1029.23</u>	<u>\$4505.08</u>

S-70

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS,
INC., J. IRVING WEISS, ABRAHAM B. WEISS,

Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,

Appellant,

v.

SYDNEY B. WERTHEIMER,

Receiver-Appellee.

No. 74-2023

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 1974, I served, by United States mail, postage prepaid, two copies of the Memorandum of the Securities and Exchange Commission, Appellee in the above case, and one copy of the Commission's Supplemental Appendix, upon the following persons:

Hobart L. Brinsmade, Esquire
David J. Mountan, Jr., Esquire
Conboy, Hewitt, O'Brien & Boardman
20 Exchange Place
New York, New York 10005

Leon Leighton, Esquire
6 East 45th Street
New York, New York 10017

15

FREDERICK L. WHITE
Attorney

74-2023

ORIGINAL

B-15

United States Court of Appeals

For the Second Circuit.

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee,
against

CAPITAL COUNSELLORS, INC., CAPITAL ADVISORS, INC.,
J. IRVING WEISS, ABRAHAM B. WEISS,
Defendants.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Appellant,
SYDNEY B. WERTHEIMER,
Receiver-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

EXHIBIT VOLUME.

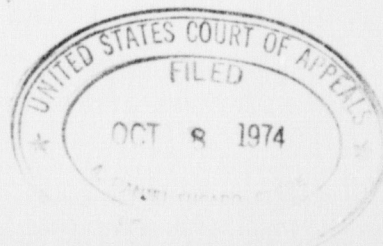
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Attorneys Pro Se, Appellant,
20 Exchange Place,
New York, N. Y. 10005

WILLIAM D. MORAN,
*Regional Administrator, Securities and Exchange
Commission, Attorney for Plaintiff-Appellee,*
26 Federal Plaza,
New York, N. Y. 10007

LEON LEIGHTON,
Attorney for Receiver-Appellee,
6 East 45th Street,
New York, N. Y. 10017

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 782-6978—1974

(4583)



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Plaintiff's Exhibit 39	80a
Plaintiff's Exhibit 40	84a

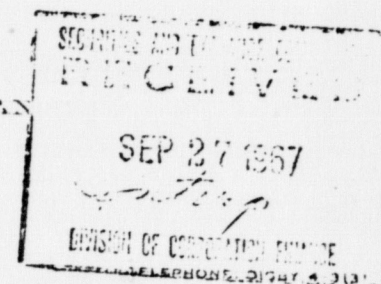
73a

PLAINTIFF'S EXHIBIT 4.
CONBOY, HEWITT, O'BRIEN & BOARDMAN

20 EXCHANGE PLACE

NEW YORK, N. Y. 10005

S. T. TYNION
RD. F. MUTLER
IN F. HARTUNG
RT. L. BRINGMADE
AS J. NEVINS
J. MOUNTAIN, JR.
NE J. T. FLANAGAN
AS V. McMAHON
ANDER HOLTZMAN
AM J. O'CONNOR
GE P. KRAMER



CABLE ADDRESS
DIALBOARD, N.Y.

September 25, 1967

George P. Michaely, Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
500 North Capital Street, N.W.
Washington, D.C. 20049

RECEIVED
SEP 27 1967

Re: Capital Counsellors

SECURITIES & EXCHANGE
COMMISSION

Dear Mr. Michaely:

As counsel for Mr. J. Irving Weiss and Mr. Abraham B. Weiss, partners in Capital Counsellors, a New York partnership located at 50 Broad Street, New York, N.Y. 10004, our firm has been asked to correspond with you with respect to a recent meeting between yourself, Mr. J. Irving Weiss, Messrs. Singer, Sporkin and Weiss of the Commission and Mr. O'Neill of the Federal Home Loan Bank Board on Wednesday, September 20th.

We understand that the purpose of the meeting was to determine whether the Weiss brothers were engaged in the sale of a "security" requiring registration under the Securities Act of 1933 and that the Staff concluded that there should be a further meeting on Friday, September 29th, for the purpose of determining what modifications, if any, were necessary in the present procedures of Capital Counsellors for arranging purchases of U.S. Government securities.

As I believe Mr. Weiss explained to you, the Capital Counsellors Government Securities program involves in addition to the partners, two Delaware corporations controlled by Capital Counsellors: Capital Counsellors, Inc. ("Counsellors"), organized in 1959 and registered with the Commission as a Broker-Dealer (File No. 801-2426), and Capital Advisors, Inc. ("Advisors"), organized in 1960 and registered with the Commission as an Investment Advisor (File No. 2-16933).

The Government Securities program is designed for sophisticated and wealthy investors able to invest in multiples of \$10,000 to obtain margin loans at favorable rates for investing in U.S. Government securities. The ordinary brokers' margin loan

PLAINTIFF'S EXHIBIT 4

for the purchase of securities exceeds 7%. Investors in the Government Securities program are able to obtain this type of money at the best commercial rate, through the efforts of Capital Counselors in obtaining commitments from banks and other financial institutions, secured by the Government securities purchased, on the basis of a promise of higher rates of return than those securities themselves produce. In addition to providing an attractive service for the well-informed investors, the Government Securities program also directly benefits the U.S. Government by sustaining a substantial demand, financed by large institutional investors, for Government securities.

The mechanics of the program are basically as follows:

(1) Capital Counsellors obtains a commitment from a non-bank lender such as a savings and loan association, in the form of letter enclosed herewith as "Exhibit A," to advance a certain sum of money to be deposited in a bank escrow account and to be used to purchase and sell U.S. Government securities as Capital Counsellors shall direct. Securities purchase are to be held for the account and further sums are to be deposited in the account by Capital Counsellors if the market value of the escrow securities falls below 90% of their purchase price. The lender agrees not to revoke its commitment or remove any securities for a period of two years, renewable for an additional year at Capital Counsellors' option. Capital Counsellors guarantees that the lender will be paid at the best commercial rate, currently from 6 to 6 1/2% per annum, well above the short-term Treasury bill yield.

(2) Capital Counsellors meanwhile obtains a number of commitments from private investors to purchase Government securities in multiples of \$100,000, putting up \$10,000 for each unit taken. This deposit is placed in a special account maintained by Capital Counsellors. The commitment letter, in the form of "Exhibit B" attached, provides that Counsellors assigns so much of its right, title and interest in the lender agreement (see (1) above) as covers the units taken. This effectively transfers to each investor the right to designate how and when U.S. Government securities placed in the bank escrow account are to be bought and sold. In addition, the investor takes over the duties of Capital Counsellors, which include the commitment to deposit in the escrow account from time to time sufficient money to make up the difference between the interest received on the U.S. Government securities purchased and the commitment to the lender to pay the agreed rate.

PLAINTIFF'S EXHIBIT 4

(3) Capital Counsellors then deposits in the bank escrow account from each investor's unit down payment such funds as are necessary for the purchase of U.S. Government securities, under an escrow agreement in the form of "Exhibit C" attached. The agreement provides that Capital Counsellors, as agent for the investors involved, will instruct the Bank how and when to purchase and sell Government securities.

(4) Advisors then suggests from time to time to each investor how he ought to purchase and sell the Government securities in his escrow account. The initial agreement with Capital Counsellors provides for a 1/8 of 1% operating fee and a 1/2 of 1% assignment fee, which cover the investment advisory services rendered by Advisors and services of Capital Counsellors in acting as depository and paying agent for the investors during the term of the agreements.

As a variation, a bank may act both as lender and custodian, operating under a simple note arrangement which is assigned by Capital Counsellors to the investor.

We respectfully submit that the above arrangements do not create a "security" within the sense of Section 2(1) of the Securities Act of 1933, or, even if any "security" is created, Capital Counsellors is engaged in a non-public offering exempt under Section 4(2) of that Act.

On the first point, we draw your attention to the fact that the investor ends up with the sole power to control the purchase and sale of the U.S. Government securities in the escrow account and thus the sole responsibility for management decision. The investor does not rely directly and completely on the efforts of third party for his profits, as in the "Tung Tree" and "Cattle Herd" situations. The investor is given two things and two things alone by the Government Securities program of Capital Counsellors: (1) the opportunity to obtain money for the purchase of U.S. Government securities at a more favorable rate than that generally available and (2) investment advisory services in deciding how and when to buy and sell those securities.

Perhaps it would better place the Government Securities program in focus to relate it to Atlantic Fund for Investment in United States Securities ("the Fund"), controlled by Capital Counsellors and registered with the Commission (File No. 2-16825). The Fund is invested in U.S. Government securities of exactly the same kind as those involved in the Government Securities program. The

PLAINTIFF'S EXHIBIT 4

only difference is that the investment management is handled by Advisors rather than left to the investor with the aid of Advisors. Each potential investor in the Capital Counsellors group of investment plans is asked whether he would like to manage his portfolio himself or have it managed by Capital Counsellors. Those who choose the latter course will invest in the Fund. Those who choose the former will invest in the Government Securities program. Thus, an investor's decision to put his money into the Government Securities program represents a deliberate reservation of management authority, which is foreign to the type of relationship normally embraced in the concept of a "security".

On the second point, Capital Counsellors has individually negotiated and contracted with approximately 55 investors to date, all well-to-do and sophisticated enough in money matters to realize the speculative risks, as well as the opportunities, which surround concentrated investment in the Government securities market. In other words, they meet the standards of S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953).

Moreover, Counsellors and Advisors are registered with the Commission and are subject to rules governing information distributed by broker-dealers and investment advisors and to the surveillance of Staff members on a regular basis.

We respectfully submit that the character of the Capital Counsellors Government Securities program and the number and type of investors intended to be attracted thereby are not suitable subjects for regulation by means of the registration requirements of the Securities Act of 1933, but more properly fall within the scope of broker-dealer and investment advisor activities, where surveillance is already assured.

On the basis of the foregoing, and in reliance on the opinion of this firm as counsel that registration is not necessary, we respectfully request that your Division indicate whether, or on what conditions, it will not recommend that the Commission take action if investors continue to be taken into the program without the filing of a Registration Statement under the 1933 Act.

As we understand that a further meeting is scheduled at your office on Friday morning, September 29th, to deal with the questions presented in the last meeting and this letter, we respectfully request a determination at that meeting as to what action we should take.

Sincerely yours,

Geoffrey T. Chalmers
Geoffrey T. Chalmers

GTC:F
Enclosures

PLAINTIFF'S EXHIBIT 4

cc: Mr. J. Irving Weiss
Mr. Bertram Singer
Stanley Sporkin, Esq.
Ezra Weiss, Esq.
John O'Neill, Esq.

PLAINTIFF'S EXHIBIT 5.
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20540



DIVISION OF
CORPORATION FINANCE

NOV 17 1967

Mr. Geoffrey T. Chalmers
Conboy, Hewitt, O'Brien & Boardman
20 Exchange Place
New York, New York 10005

Re: Capital Counsellors

Dear Mr. Chalmers:

This is in reference to your letter of October 31, 1967 in which you set forth the manner in which Capital Counsellors, Inc., a registered broker-dealer, and Capital Advisors, Inc., a registered investment advisor, will operate the Government Securities Program which was the subject of several conferences between you and members of the Commission's staff. On the basis of our latest discussion and your letter of October 31 I understand that the program will be operated as follows.

Capital Counsellors, Inc. would borrow from commercial banks, on a straight loan basis, up to \$100,000,000 in \$1,000,000 increments for two-year periods (renewable for a third year) at interest rates ranging from 6½% to 6¾% and would immediately purchase short-term government securities in its name and pledge those securities with the lending bank as security for the loan. It would then allocate the loan allotment, in \$100,000 increments, among customers previously solicited, receiving from each customer \$10,000 for each increment taken. Each customer would have the obligation to pay the bank loan rate on that portion allocated to him and would have the sole discretion, subject to the bank's right to call for more collateral, to buy and sell the securities pledged on that portion taken by him.

Capital Counsellors, Inc. would act as paying agent for its customers, putting down \$5,000 of the \$10,000 received for each \$100,000 increment as the required margin payment and holding the balance to pay, over a two-year period, the difference between the interest obtained on the short-term securities purchased and the interest rate on the bank loan. For this service Capital Counsellors, Inc. would charge a fee of ¼ of 1% per annum of the amount of the bank's commitment to each customer.

Capital Advisors, Inc., the registered investment advisor, would agree with each customer to provide him with investment advice with respect to the U.S. Government Securities. For this service Capital Advisors, Inc. would receive a fee of ½ of 1% of the customer's aggregate investment, payable at the end of the two-year period.

PLAINTIFF'S EXHIBIT 5

- 2 -

The sales literature that is to be used in connection with the Government Securities Program has been modified to remove references to Atlantic Fund and to make clear that the program does not involve the management of the customer's securities by Capital Advisors, Inc., Capital Counsellors, Inc. or by the partnership, Capital Counsellors. You have also advised that the necessary amendments to the Form ADV for Capital Advisors, Inc. are being made.

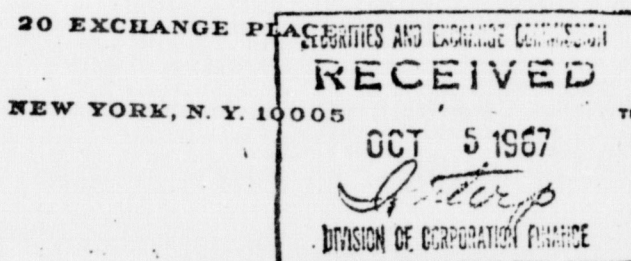
Although your letter of October 31, 1967 does not by its terms require any response unless the Division disagrees with your opinion that operation of the Government Securities Program as described would not involve the offer or sale of securities, I think it would be preferable if both your records and ours were to reflect the Division's position on this matter. Accordingly, I am advising you that no action will be recommended to the Commission if the Government Securities Program is operated on the basis described in your letter without registration under the Securities Act of 1933.

Sincerely yours,

George P. Michael, Jr.
George P. Michael, Jr.
Chief Counsel
Division of Corporation Finance

PLAINTIFF'S EXHIBIT 39.

CONDOX, HEWITT, O'BRIEN & BOARDMAN



October 3, 1967

T. TYNION
D. F. BUTLER
H. F. HARTUNG
T. L. BRINSMADE
S. J. NEVINS
J. MOUNTAIN, JR.
E. J. T. FLANAGAN
S. V. McMAHON
ANDER HOLTZMAN
M. J. O'CONNOR
E. P. KRAMER

George B. Michaely, Jr., Esq.
Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549



RECD-S.E.C.
OCT 5 -1967

Re: Capital Counsellors

Dear Mr. Michaely:

It was a pleasure to meet with you and Messrs. Sporkin, Weiss and Robbins last Friday morning and have your views on the Securities Act problems relating to the U. S. Government Securities Program of Capital Counsellors.

You asked me to provide you with all material sent out by Capital Counsellors to the public relating to the Government Securities Program.

I understand from conversations with the Weiss brothers that the Government Securities Program was first conceived in January, 1967, and cleared with the Federal Home Loan Bank Board in February. A first mailing went out in the form of Exhibit A, on April 17 and 18 to 1,000 subscribers to the Money and Credit Reports put out by Capital Advisors, Inc. and to an additional 3,000 individuals who were ex-subscribers and people with similar interests in U. S. Government Securities. Between the end of April and mid-June approximately 500 persons, exclusively subscribers, replied to this initial mailing and they were sent a copy of the short memorandum attached as Exhibit B. On May 24 a further mailing of Exhibit B was made to the balance of the subscribers who had not replied to the April 17 and 18 mailing and, through June and July, 400 additional persons replied. Early in September, Exhibit A and Exhibit B were revised and incorporated in Exhibit C which was sent out to the 400 persons who had replied to the May 24 mailing. Capital Counsellors is preparing a new revision of the memorandum to answer further inquiries, in the form of Exhibit D.

PLAINTIFF'S EXHIBIT 39

George B. Michaely, Jr., Esq. -2-

October 3, 1967

As I mentioned to you, 55 individuals eventually became customers of Capital Counsellors under the Program. These people are all subscribers to Money and Credit Reports, with the exception of two individuals referred to Mr. Irving Weiss by a friend. In each case, the customer made a personal appointment with one of the Weiss brothers, talked the mechanics of the Program over, and signed an agreement.

With respect to the savings and loan side of the Program, a letter was sent to approximately 300 savings and loan institutions on about July 17 in the form of Exhibit E. Largely as the result of the liquidity problem with the Federal Home Loan Bank Board which we discussed last Friday, no significant response was made to this mailing. The one savings and loan institution now investing in this program was located for it by an independent finder.

Also, Capital Counsellors placed an advertisement in Barron's and the Wall Street Journal in mid-August in the form of Exhibit F. Approximately 40 responses were received from these advertisements, and those people responding to the advertisement received a reply in the form of Exhibit G. As you are no doubt aware, the Program has recently been concentrating on banks rather than savings and loan institutions.

The above documentation bears out my observation that the customers were offered an account controlled by them. For example, on page 5 of Exhibit A and Exhibit C the plans are represented as being designed "to help you manage your outright holdings of U. S. Government Securities". While at certain points, the documentation contains phrases which are not entirely consistent with the above statement, this is due more to inattention about phrasing than to impreciseness about the terms of the transaction itself.

As I made clear on Friday, it does not appear to me that Capital Counsellors is issuing a "security" subject to the normal registration requirements of the Securities Act of 1933. Apparently, you are of the view that the agreement between Capital Counsellors and the savings and loan institutions creates a "profit-sharing agreement" or "investment contract" which is something other than the U. S. Government securities placed in the escrow account pursuant thereto. Your view is that the agreement with the savings and loan institutions is like an ADR, a substitute security, having all the characteristics of the securities deposited plus an added feature (in this case, the guarantee of additional interest to the savings and loan institution) which makes it something different from the underlying Bills and Bonds.

PLAINTIFF'S EXHIBIT 39

George B. Michaely, Jr., Esq. -3- October 3, 1967

I am not about to argue that the savings and loan agreement is not a "security" within the strict definition contained in the Act, which is so all-embracing as to include savings accounts and "puts" and "calls", as well as equipment financing agreements and life insurance loan participations. However, I do argue that it would be as sensible to require registration of the latter two instruments as it would be to require the registration of the savings and loan agreements involved in the Government Securities program of Capital Counsellors, Inc. The three types of investment operate on the same financial level: they are non-transferrable, they are usually in amounts of \$1,000,000 or more and they are secured by underlying assets which can be sold in the event of default or speedy market decline.

You point out that savings and loan associations are in need of the detailed type of disclosure which only a prospectus can give and refer to the real estate participation financings which were placed into registration during the late 1950's. However, the real estate participations were being offered on an impersonal basis to uninformed investors in small amounts and there was no escrow arrangement involved, only a mortgage which contained cumbersome procedures for foreclosing on the security in the event of default. Here, the security is at all times in the escrow account and can be sold immediately on the open market in the event of default or failure to satisfy a margin call. Under these circumstances, it would seem that less care need be taken that the savings and loan association be provided with a prospectus type of disclosure, particularly since the savings and loan institutions are in a better position than the average investor to evaluate the financial soundness of Capital Counsellors.

With respect to "the back end of the deal", I think that we were in accord that the services rendered by Capital Counsellors in securing credit for the purchase of U. S. Government Securities by customers and the services rendered by Capital Advisors, Inc. in suggesting to customers how to manage their accounts did not add up to the type of activity generally regarded as separating management from ownership and creating a "security". A "security" is created when a customer turns over his money to Atlantic Fund for Investment in U. S. Government Securities, Inc. In that case, Advisors puts in the buy and sell orders and has overriding discretion as to how and when the underlying securities are to be sold. The Government Securities Program however, works like an ordinary broker's account. The customer puts in the buy and sell orders, accepting or disregarding the broker's advice. The only distinction between

PLAINTIFF'S EXHIBIT 39

George B. Michaely, Jr., Esq. -4- October 3, 1967

an ordinary broker's account and the Government Securities Program is that in the latter case, the securities involved are pledged with a bank for the account of a savings and loan institution, instead of pledged with a broker for the account of the bank putting up the money. In both cases, the broker goes out and arranges the credit for a group of his customers. In both cases, it is the customers who control the disposition of the pledged securities and who bear the ultimate responsibility for interest and principal payments.

It would be as sensible, in my view, to require the registration of customer accounts under the Program as it would be to require the registration of brokerage account agreements generally.

Again, thank you very much for giving us an opportunity to come down and express our views. We are of the opinion that the registration requirements of the Act would be so burdensome, if applied to our Program, as to force us to abandon it altogether. We would, of course, be glad to make such modifications in it as you may suggest for the purpose of providing any investor protection or reporting to the Commission that you feel to be lacking.

Sincerely yours,

Geoffrey T. Chalmers
Geoffrey T. Chalmers

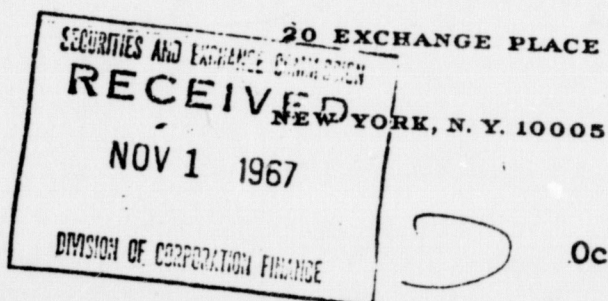
GTC:BKM
Encl.

cc: Bertram Singer
Stanley Sporkin, Esq.
Ezra Weiss, Esq.
Martin Robbins
David Heyman

84a

PLAINTIFF'S EXHIBIT 40.
CONBOY, HEWITT, O'BRIEN & BOARDMAN

BIT
COURT
N. Y.



TELEPHONE: DIBBY 4-3131

CABLE ADDRESS:
DIALBOARD, N. Y.

October 31, 1967

George P. Michaely, Jr., Esq.
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
500 North Capitol Street, N. W.
Washington, D. C. 20549

RECD-S.E.C.

NOV 1 - 1967

Re: Capital Counsellors

Dear Mr. Michaely:

It was a pleasure to be able to talk with you last Friday at some length about the operations of Capital Counsellors. It was particularly helpful to talk about the 1933 Act registration requirements applicable to the Government Securities Program of Capital Counsellors, on the basis of our September 20 and September 29 meetings and my letters to you dated September 25 and October 3.

As I explained to you on Friday, we are prepared to modify the Program so as to make clear that Capital Counsellors and its two affiliates are merely operating within the normal scope of broker and investment advisor activities. You on your part stated that if the Program were modified as I suggested, the Division of Corporation Finance would not be inclined to recommend that the registration requirements of the Securities Act of 1933 be imposed.

The proposed changes are as follows: Capital Counsellors, the partnership, would no longer perform any of its former functions. Capital Counsellors, Inc., the registered broker-dealer, would borrow from commercial banks, on a straight loan basis, up to \$100,000,000 in \$1,000,000 increments for two-year periods (renewable for a third year) at interest rates ranging from 6 1/4% to 6 1/2% and would immediately purchase short-term U.S. Government securities in its name and pledge them with the bank as security for the loan, as any broker normally does. The loan agreement would take the form of Exhibit A enclosed. Shortly after obtaining a \$1,000,000 allotment, Capital Counsellors would allocate it among customers

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PLAINTIFF'S EXHIBIT 40
George P. Michaely, Jr., Esq. -2- October 31, 1967

previously solicited, in \$100,000 increments, receiving from the customers \$10,000 for each increment taken. Each customer, as before, would have the obligation to pay the bank loan rate on that portion taken by him only, and would have the sole discretion (subject to the bank's right to call for more collateral) to buy and sell the securities pledged on that portion taken by him. The customer agreement would take the form of Exhibit B enclosed.

Capital Counsellors, Inc. would act as paying agent for its customers, putting down \$5,000 of the \$10,000 received for each \$100,000 as the required margin payment and holding the balance to pay 1% to 2 1/2% interest difference between the 4 - 5% on the short-term securities purchased and the 6 - 6 1/2% bank loan interest rate, over a two-year period. For this service, Capital Counsellors, Inc. would take 1/4 of 1% per annum on the amount of the bank's commitment to each customer.

Capital Advisors, Inc., the registered investment advisor, would agree at the same time to provide the customer with the necessary investment advice with respect to U.S. Government Securities. In particular, Advisors would alert the investor to the favorable condition for purchases in a depressed long-term U.S. Government Securities market when that favorable condition comes into existence. For these services, Advisors would receive 1/2 of 1% of the customer's aggregate investment, payable at the end of the two-year period.

You wanted the names of the banks who are presently lending under the Government Securities Program. They are: The American National Bank of St. Paul, Minn.; The Lake View Savings Bank and Trust Company, Chicago, Ill.; the Security National Bank, Chicago, Ill.; and the First National Bank of Baltimore, Md.

As you suggested, we are modifying our sales literature to remove all possible references to Atlantic Fund and to make clear that the Government Securities Program does not involve the management of the customer's securities. A revised sales memorandum in the form of Exhibit C is enclosed.

We are sending in an amendment to Form ADV for Advisors, setting forth the fee arrangements to be made as an amendment to Item 10(a). Otherwise, the registration of Advisors appears to be in order.

As we are under a good deal of pressure to straighten this thing out, I would like to assume that there is nothing in our revised Plan to which the Division would object and

86a

PLAINTIFF'S EXHIBIT 40
George P. Michael, Jr., Esq. -3- October 31, 1967

that on Monday, November 6 we may proceed under it if we have not heard from you to the contrary.

Again, thank you for your assistance.

Yours sincerely,

Geoffrey T. Chalmers
Geoffrey T. Chalmers

GTC:BKM
Encl.

COMPANY	CAPITAL COUNSELLORS	DATE	10-31-67
LETTER FROM		LETTER	
SUBJECT	Conboy, Hewitt, O'Brien & Boardman (Geoffrey T. Chalmers)	11-1-67	
	Re Proposed changes.	REC'D BY S.E.C.	
ASSIGNED TO SECTION		11-1-67	
TO BE ANSWERED BY	Mr. Michael	REC'D BY SECTION	
FOR SIGNATURE OF	Mr. MICHAEL	ANSWER SENT UP	
		11-1-67	
		ANSWER MAILED	

SEC FORM 177

87a

PLAINTIFF'S EXHIBIT 40

Due Date _____

Chicago, Ill., _____ 19____ Amount \$1,410,000.00@63/8%

Two (2) Years-----after date

We received the undersigned promises to pay to the order of

LAKE VIEW TRUST AND SAVINGS BANK, at its office,
CHICAGO, ILLINOIS

One Million Four Hundred Ten Thousand and 00/100-----

with interest @ 63/8%

Dollars

Interest at Seven per cent per annum after maturity until paid.

There has been deposited by the undersigned with said bank as collateral security for the payment of this note and of every other liability or liabilities, direct or contingent, now owing or which may hereafter be owing, whether now or hereafter contracted, of the undersigned (including all liabilities of any partnership created by such partnership while the undersigned, if an individual or individuals, may have been or may be a member or member thereof) to the said payee, or to the legal holders of this note, which collateral security the undersigned pledges to the bank and grants to the bank, the legal holder hereof, a security interest in the following property, viz.:

1.5MM U.S. Treasury Bills due 12-21-67

right on the part of the said bank or the legal holder hereof from time to time to call for additional security of such kind and value as will be satisfied by said bank or the legal holder hereof, and on failure to respond, or if in the judgment of said bank, or the legal holder hereof, said security, or any part thereof, shall have depreciated in value, then the whole of this note shall be deemed immediately payable at the option of the said bank or the legal holder hereof, with full power in said bank, or the legal holder hereof on maturity thereof, either by its terms or by election, to apply the proceeds of such security, or any part thereof, to the payment of this note, and to the payment of any other liability or liabilities, direct or contingent, now owing or which may hereafter be owing, whether now or hereafter contracted, of the undersigned (including all liabilities of any partnership created by such partnership while the undersigned, if an individual or individuals, may have been or may be a member or member thereof) to the said payee, or to the legal holders of this note, which collateral security the undersigned pledges to the bank and grants to the bank, the legal holder hereof, a security interest in the following property, viz.:

Said bank, or the legal holder hereof, and without advertising the same and without notice to the undersigned, at any public or private sale, at the place of sale, to be a purchaser at any public sale or sales; and in the event of any sale or purchase hereunder no matter by or to whom made, all notice is hereby expressly waived; and, after deducting all legal and other costs and expenses, including reasonable attorneys' fees, from the proceeds of such sales, to apply the remainder on any one or more of said liabilities whether due or not, as said bank or the legal holder hereof shall deem proper, and return the same, if any, to the undersigned. Also, in any such event, the bank shall have full power and authority at any time or times thereafter to exercise all or more of the remedies and shall have all the rights of a secured party under the Uniform Commercial Code of Illinois. Any requirement of the Code of Illinois shall be met if such notice is mailed, postage prepaid, to the undersigned as shown on the records of the bank at least 5 days prior to the date of the sale, disposition or other event or thing giving rise to the requirement of notice. Demand, presentment, protest and notice of dishonor are hereby waived. Said bank or the legal holder hereof, may at its, his or their discretion enforce the collection of said security, additions thereto and substitutes thereof or otherwise, and may surrender, compromise, release, renew, extend or exchange all or any of the same. Said bank or the legal holder hereof is hereby authorized and empowered at any time to apply to the payment of any liability or liabilities, whether the same be due or not, of the undersigned, to said bank, or the legal holder hereof, (including all liabilities of any partnership created by such partnership while the undersigned, if an individual or individuals, may have been or may be a member or members thereof), whether the same be due or not, all property real and personal, of every kind and description, including credits, collections, moneys, drafts, checks, notes, bills or accounts (whether on hand or in transit) of the undersigned. To secure the payment of said note or to become due hereunder, the undersigned, and each of them hereby authorizes irrevocably any attorney of any court of record to appear for the undersigned or any one or more of them in such court, in term time or vacation, after this instrument becomes due and confess judgment without process in favor of the legal holder of this note for such amount as may appear unpaid thereon, together with costs and reasonable attorneys' fees and to waive and release all errors and to intervene in any such proceeding and to consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof.

Broad Street, Room 630, New York, New York

Address

Capital Counsellors, Inc.

J. Irving Weiss

Telephone

88a

PLAINTIFF'S EXHIBIT 40

FOR VALUE RECEIVED, we, the undersigned, do hereby jointly and severally guarantee the payment of the within note at maturity, in accordance with its terms, or if such maturity is extended, its maturity at any time thereafter, with interest at Seven Per Cent (7%) per annum from maturity until paid, and agree to pay all costs, expenses, and attorneys' fees paid or incurred in collecting the same from or in prosecuting any suit against any one or more of the makers, endorsers, or guarantors of said note, and the undersigned hereby consent that the securities for the said loan may be exchanged or surrendered from time to time, or the payment of any of the securities thereof extended from time to time, without notice to the undersigned, and the undersigned hereby waive any and all demand, notice, protest, and notice of protest.

It is expressly agreed that the extension of time of payment of this note shall not discharge any person secondarily liable, but that payment of said note may be extended from time to time until paid without affecting the liability of the undersigned, or any of them, thereon, and with out notice to the undersigned, or any of them.

To secure the payment of said amount due or to become due hereunder, the undersigned, and each of them hereby authorizes irrevocably any attorney of any court of record to appear for the undersigned or any one or more of them in such court, in term time or vacation, after this instrument becomes due and confess judgment without process in favor of the legal holder of this note for such amount as may appear unpaid thereon, together with costs and reasonable attorneys' fees, and to waive and release all errors which may intervene in any such proceeding and to consent to immediate execution upon such judgment, hereby ratifying and confirming all that the said attorney may do by virtue hereof.

FORM 820 5-65 - S.M.CO.

89a

PLAINTIFF'S EXHIBIT 40

CAPITAL COUNSELLORS, INC.
50 BROAD STREET
NEW YORK 4, N.Y.

EXHIBIT B

WHITEHALL 4-1460

, 1967

Dear

This will confirm our agreement with respect to the purchase by you under our U. S. Government Securities Program of \$ face amount of U. S. Government Securities, \$ of which you will furnish on your execution of this agreement. \$ of which will be furnished by our assignment to you, effective on your execution of this agreement, of \$ of our \$ aggregate obligation under a loan agreement dated , 19 with at % interest and due 19 A copy of the loan agreement is enclosed herewith.

The securities in question are on deposit in our name with the assigned to you, and are subject to all the terms and conditions of the loan agreement, including the right of the bank to call for additional security and to sell the present security in satisfaction of the loan on the terms and conditions set forth in the agreement, to all of which you agree to be bound to the extent of your investment.

We agree to act as your agent for the purchase and sale of U. S. Government securities on your order from time to time, for the collection of sums due you and for the payment of interest and principal on your portion of the loan obligation when due and, pursuant thereto, you will deposit with us an additional \$ on the execution of this agreement to fulfil your obligations. For our services as agent, you agree to pay us an annual fee of 1/4 of 1% of the amount of your investment hereunder, per annum.

In addition, Capital Advisors, Inc. agrees to render you investment advisory services in connection with your investment hereunder at a fee of 1/2 of 1% of the aggregate value of your investment on , 19 , payable on that date. It is understood that neither Capital Counsellors, Inc. nor Capital Advisors, Inc. will have any discretionary power to purchase and sell the securities in your account without your prior authorization.

If this is in accord with our understanding, please sign and return the enclosed copy of this letter, together with your check for \$

Very truly yours,

CAPITAL COUNSELLORS, INC.

By _____
President

CAPITAL ADVISORS, INC.

By _____
President

AGREED AND ACCEPTED:

Date _____

PLAINTIFF'S EXHIBIT 40

KEEP THIS MEMORANDUM ...

It could easily become
your insurance policy...
to preserve your wealth...
and add to it.

M E M O R A N D U M

- ON -

UNITED STATES GOVERNMENT SECURITIES

- By -

J. Irving Weiss

This Memorandum Tells You:

1. How You Can Protect The Value Of

- (a) Your Business
- (b) Your Earnings
- (c) Your Investments

2. How To Make Your Capital Grow.

About Capital Counsellors, Inc.

J. Irving Weiss, president, with his brother, Abraham B. Weiss, has written several books on the changing structures and function of money from a practical and fresh point of view. After devoting many years in the study of money, he and his brother have become convinced that most businessmen, investors and even bankers have been taken up with daily business routine and have failed to take note of brand new conditions. They contend that to come out ahead in the immediate future, and for years to come, YOU MUST TAKE HEED of these new circumstances now surrounding your money -- else you may well find yourself "missing the boat".

They believe they can offer you great help. They manage and edit the widely read Money and Credit Reports issued twice a month. They have also established a United States Government Securities Division of Capital Counsellors, Inc., a registered broker-dealer controlled by them, and have a controlling interest in Capital Advisors Inc., a registered investment advisor which publishes Money and Credit Reports.

PLAINTIFF'S EXHIBIT 40

MAKING MONEY WITH
UNITED STATES GOVERNMENT SECURITIES

The prices of U. S. Government Securities have been fluctuating so widely in the postwar years as to make it possible for one to make or lose fortunes.

In truth despite all the intermediate fluctuations, Government Bonds have been undergoing a long bear market since 1946. We now find from our studies that this bear market does not have much further to go, and that investors, savers and businessmen will have a rare opportunity to obtain substantial capital gains.

The Number One Pitfall

In the long period that the bear market in Government Bonds has been under way, all attempts to halt the downturn and create a major rise resulted in failure.

Another premature attempt to create a boom is now being made in Washington, with the cooperation of some of the most powerful elements in banking. Of course this strong combination commands respect, but one must also be able to recognize the fact that there are powerful adjustment forces still at work that could easily cause this attempt to fail disastrously -- and could easily turn out to be the number one pitfall for many investors.

Our money managers in Washington, we believe, are now fighting against forces even more powerful than those that stymied their efforts in earlier years.

Important: While this all out effort is going on for easy money, our strategy is to ACT NOW. This calls for nailing down funds at reasonable rates of interest to be converted into capital gains when interest rates will be much higher, bond prices on the bargain counter and money extremely difficult to borrow.

In short it is our view that in this last phase of the decline it is most important to avoid the temptation of rushing in prematurely and, instead, to prepare the necessary strategy for successful capital gains at the right time.

This report briefly spells out:

- (1) How United States Government Securities can become your number one money making medium.
- (2) How they can act as a vehicle to provide you with protection against losses in your business and investments.
- (3) How we can provide the advice to help you ... TIME your purchases so as to maximize profits and minimize losses.

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Let us first analyze the strengths and the weaknesses of this powerful combine of government and banking that is now attempting to create a boom in the bond market.

The Major Obstacle To Easy Money

In this attempt the Johnson Administration has won the cooperation of the Federal Reserve System and other banking elements in a drive to make money more available and easier -- primarily to counter the threat of a recession in business.

This of course is a worthy attempt, but the only hitch is that our political leaders, together with the Federal Reserve System, permitted the control over money and credit to pass into the hands of others:

One of the top functions of the Federal Reserve System has always been to prevent excesses. Yet, in the years between 1959 and 1966, it virtually stood powerless while a MASSIVE CREDIT INFLATION OF SOME 1/2 TRILLION DOLLARS swept the nation -- a figure unmatched in the annals of our history.

Here are the specific areas in which this credit inflation occurred:

Commercial Bank Loans	\$ 94 Billion
Mortgages of All Kinds	194 "
Corporate Debt	106 "
Trade Credit	109 "
Grand Total	\$503 "

Does it take any imagination to realize that -- once this huge amount of money and credit was issued -- the responsibility over this grand total shifted to those involved in the maze of transactions?

The chances are that the bulk of these transactions were conducted with good judgement and faith. What we want to call to your attention is:

1 - That most of these transactions took place while our economy was travelling at its fastest rate of growth.

2 - That imprudent judgements were inevitably made because this speed of growth was not sustainable.

3 - That in the process the Federal Reserve, other regulatory agencies in Washington and the States -- and our lawmakers as well -- lost control over money and credit to the thousands of bankers, businessmen and the millions of consumers involved in these transactions who now run the show. Their action or inaction is what really counts.

To be more specific, millions of consumers are just

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time, has been undercut and weakened -- and also puts into even more serious question his ability to keep interest rates down and bring on a premature bull market in bonds.

THE LAST PHASE OF THE DECLINE IN BONDS

There is a textbook theory about interest rates and business which goes something like this: When business is strong interest rates rise because money is needed by business. If business is weak, then interest rates decline because money is less needed by business.

The only fault with this reasoning is that it does not take into consideration the entirely new and different circumstances which can easily change the application of this overall truism.

There now exists a strange combination of forces which can be summed up as follows:

1. There is a big lack of genuine cash resources in the nation because we have more than used them up in the break-neck like speed of pushing growth.

2. In all previous periods of booms and expansion in this country, at least one or more major segments remained in good shape -- such as the business, banking, or governmental groups, while only one or two expanded.

3. During the last stretched out phase of the postwar boom, all of these groups expended at one and the same time, including the Federal Reserve System which practically doubled its credit expansion.

4. This leaves little in the way of support to cushion a setback.

Why The Last Phase Of The Bear Market In Government Bonds Can Be Deep And Quick

There are a number of factors which can easily complicate the position of the bond market and bring on a steep and rapid decline in prices.

Among the most important is that Uncle Sam's revenues are intimately tied in with business volume and profits as a virtual partner in every business as well as a partner to the income and profits of individuals.

The greater the adjustment in business, the more must Uncle Sam borrow, since he will be unable to collect his share of tax receipts. It is well known that Washington has left itself with no reserves, as it pushed its budgets to the very extreme. These fresh borrowings must show up in the money markets, as well as in the long term capital bond markets. They inevitably will result in a further rise in interest rates.

May we remind you again that business is sadly

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lacking in cash reserves. Even our most conservative blue chip corporations have relied so heavily on daily increasing cash flows from good business that they neglected to build up reserves in cash. Inevitably they are going to need more money.

Just these two demand sources alone will become a heavy burden on any liquid cash that may be around. It can only result in much higher interest rates and conversely sharp and rapid declines in the prices for bonds of all kinds.

INSURING YOUR WEALTH AGAINST POSSIBLE LOSSES

It is quite obvious that the great majority of investors and businessmen have placed their faith in the ability of Uncle Sam to maneuver money and credit so as to (1) prevent a recession and (2) to bring a bull market in bonds.

We believe that the odds are heavily stacked against Uncle Sam in both cases this time. We believe that eventually success will come -- but not until a severe and quick adjustment has taken place.

It is mainly because of this severe adjustment that we believe one should take out a form of insurance against the possible serious losses that can accrue to your common stocks, your business, your income, your real estate and other holdings.

We have therefore prepared two major plans which relate only to United States Government Securities:

- 1 - To provide you with a new kind of built-in insurance policy which can help protect your wealth.
- 2 - To allow you to make a play for capital gains.

- 3 - To help you manage your outright holdings of U. S. Government Securities.

We will now spell out each one of these plans in detail.

PLAN #1

Let us assume you have real estate holdings, business interests, or own common stocks and bonds -- all of which can be adversely affected by generally unexpected developments in business, money and interest rates. To cushion any possible loss that you may face due to very tight money, declining prices and worsening business conditions, we can help you as follows:

- (1) To make a purchase commitment with us in United States Government Securities in units of either \$100,000 or \$1,000,000. Each unit to be covered by a minimum margin of 10%. In the case of a \$100,000 unit this would mean an outlay of \$10,000.

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Plan #1 (Cont.)

Only short term U. S. Treasury Bills will be purchased at this time, in preparation for capital gains investment in long term Government Bonds.

(2) We have arrangements with financial institutions to make the larger sums available at reasonable fixed rates of interest for the next two years. During that time you will guarantee them a fixed rate of interest that is higher than the current rate at which they can invest with safety.

(3) In anticipation of a rise in interest rates, you will continue to own only U. S. Treasury Bills. During that time we expect that long term Government Bonds will become depressed in price. It is our belief that these bonds will sell well below intrinsic value, giving you an opportunity to purchase them at low prices.

We will advise you when we believe it is time to switch to long term Government Bonds selling at lower prices.

(4) For every dollar you risk, we anticipate a potential capital gain of approximately \$3.00, after deducting interest charges. These interest charges are deductible from current income.

PLAN #2

You may purchase outright through us, your requirements of U. S. Government Securities, be they long term or short term, and we will advise you as to purchases and sales for a straight low cost fee of 1/4 of 1%, payable annually. We believe that we can earn this fee several times over from one year to the next, by helping you achieve a combination of safety of principal, higher income and capital gains. This plan applies to separate U. S. Government Security holdings you may own.

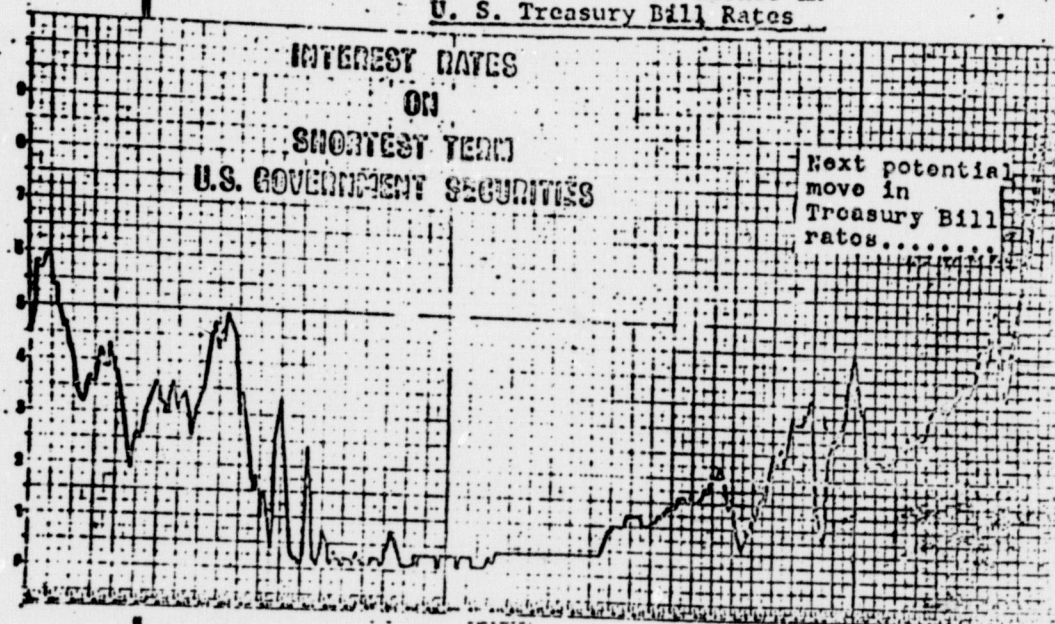
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October, 1967

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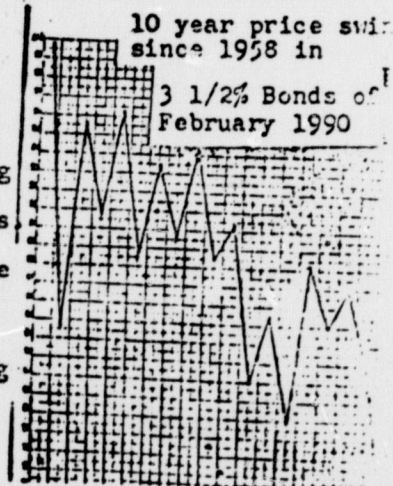
GRAPHIC PICTURE OF STRATEGY TO CONVERT
TAXABLE INCOME INTO CAPITAL GAINS
VIA U. S. GOVERNMENT SECURITIESThe First Phase: Buying U. S. Treasury Bills

Since we are first buying only Treasury Bills to avoid risk, we are paying a premium in interest rates between the return on Treasury Bills and what is guaranteed to the financial institution. But as interest rates rise for Treasury Bills we expect the carrying charge to narrow and even go over our interest cost.

The Powerful Bull Market In
U. S. Treasury Bill RatesThe Second Phase: Buying
Government Bonds

In this second stage we expect that interest rates will reach their peak under very trying financial circumstances, permitting you to purchase long term Government Bonds at very low price levels.

At the right you see one example of what has been happening to the 3 1/2% bonds of Feb. 1990. The broken line is our estimate of the direction in which it is moving in terms of price.



Services of three (3) copies of
the within Cubley is
hereby admitted this 4th day
of October, 1974

Ann Anglin
Attorney for Union

Services of three (3) copies of
the within _____ is
hereby admitted this _____ day
of _____, 197

Attorney for

